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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 111386

CASE NBR 86-1-05234 CSY
SHORT TITLE Brown, David J.
VERSUS North Carolina

DOCKETED: Jul 28 1986

Date	Proceedings and Orders
Jul 28 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Sep 3 1986	Order extending time to file response to petition until September 26, 1986.
Sep 29 1986	Brief of respondent North Carolina in opposition filed.
Oct 24 1986	REDISTRIBUTED. October 31, 1986
Nov 3 1986	The petition for a writ of certiorari is denied. Opinion by Justice O'Connor respecting the denial of certiorari. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

NO. 86-5234

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAVID J. BROWN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF UNION COUNTY,
NORTH CAROLINA

BRUCE T. CUNNINGHAM, JR.
Pollock, Fullenwider, Cunningham &
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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I.

WHETHER IT IS INEFFECTIVE ASSISTANCE OF COUNSEL FOR A DEFENSE LAWYER, WITHOUT THE DEFENDANT'S KNOWLEDGE OR CONSENT, (A) TO ARGUE AT THE CAPITAL SENTENCING HEARING THAT THE DEFENDANT IN FACT COMMITTED THE ALLEGED CRIME, AFTER HAVING DENIED THE CHARGES DURING THE GUILT-INNOCENCE PHASE; AND (B) TO CONCEDE THE EXISTENCE OF AGGRAVATING FACTORS.

II.

WHETHER THE PROSECUTION, AFTER DETERMINING DURING VOIR DIRE THAT A POTENTIAL JUROR IS NOT A "WITHERSPOON-EXCLUDABLE," MAY CONTINUE TO QUESTION THAT JUROR ABOUT HOW STRONGLY HE OR SHE SUPPORTS CAPITAL PUNISHMENT FOR THE PURPOSE OF DECIDING WHETHER TO PEREMPTORILY EXCUSE THE JUROR.

III.

WHETHER THE PROSECUTION MAY ARGUE TO THE JURY AT CAPITAL SENTENCING THAT (A) THE DEFENDANT VIOLATED THE LAW OF GOD AS STATED IN THE BOOK OF EXODUS; (B) ALL PEOPLE IN THE COMMUNITY WANT THE DEATH PENALTY IN THIS CASE; AND (C) THAT WEBSTER'S DICTIONARY PROPERLY DEFINES CERTAIN AGGRAVATING FACTORS.

IV.

WHETHER THE DEATH PENALTY IS DISCRIMINATORILY APPLIED AGAINST BLACK DEFENDANTS WHO ARE CONVICTED OF KILLING WHITE VICTIMS.

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IN THE

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OCTOBER TERM, 1985

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF UNION COUNTY,
NORTH CAROLINA

Petitioner David J. Brown, respectfully prays that a writ of certiorari be issued to review the judgment of the Superior Court of Union County, North Carolina in this case.

CITATIONS TO OPINIONS BELOW

The Order of the Superior Court of Union County, North Carolina denying petitioner's Motion for Appropriate Relief is unreported, but is attached as Appendix A.

The Order of the North Carolina Supreme Court denying petitioner's Petition for a Writ of Certiorari to review the judgment of the Superior Court of Union County, North Carolina is not yet reported, but is attached as Appendix B.

JURISDICTION

The Order of the North Carolina Supreme Court denying petitioner's Petition for a Writ of Certiorari was entered in conference on June 3, 1986, and was issued on June 16, 1986. A copy is attached as Exhibit B. The jurisdiction of this Court is invoked.

pursuant to 28 U.S.C. 1257(3). Petitioner has asserted below and now asserts a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to have the assistance of counsel for his defense.

The Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; and

The Fourteenth Amendment, which provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. The Course of Prior Proceedings.

Petitioner was convicted in two cases, consolidated for trial, of first-degree murder in the Superior Court of Union County, North Carolina, at the December 8, 1980 session. He was given two death sentences.

Petitioner appealed to the North Carolina Supreme Court, which affirmed the convictions and sentences of death. State v. Brown, 306 N.C. 151, 293 S.E. 2d 569 (1982). This Court denied certiorari in Brown v. North Carolina, 459 U.S. 1080, 74 L. Ed. 2d 642, 103 S. Ct. 503.

Petitioner filed a post-conviction proceeding in the Superior Court of Union County on July 16, 1984, in the form of a Motion for Appropriate Relief, pursuant to N.C.G.S. 15A-1411, et seq. After an evidentiary hearing on October 3, 1984, before the Honorable William H. Helms, the Superior Court of Union County denied petitioner's claims by Order entered on March 27, 1985. (Appendix

A, p. 1a). On June 15, 1985, petitioner filed a motion in the cause to reopen the hearing on the Motion for Appropriate Relief. After the evidentiary hearing on August 26, 1985, the Honorable William H. Freeman denied the motion to reopen the hearing on appropriate relief on September 9, 1985. On October 31, 1985, the petitioner filed a First Petition for Writ of Certiorari in the North Carolina Supreme Court which was denied on January 3, 1986, without prejudice to file a second Petition for Writ of Certiorari bringing forth the same alleged error as in the first Petition for Writ of Certiorari. The petitioner filed a Second Petition for Writ of Certiorari in the North Carolina Supreme Court, which was denied by Order entered June 3, 1986. (Appendix B, p. 9a).

B. The Evidence Presented at Trial.

The petitioner entered pleas of not guilty in both counts. At all times the petitioner denied the allegations against him. Evidence was presented that Shelly Dianne Chalflinch and Christina Chalflinch were found dead in their apartment on August 26, 1980, in Pinehurst, North Carolina. The evidence presented by the State was of a circumstantial nature and the petitioner did not testify.

Following verdicts of guilty in both cases, a sentencing hearing was held before the same jury. Because the jury determined that the mitigating factor did not outweigh the aggravating factors, under North Carolina law, imposition of the death penalty was automatic.

C. The Evidence Presented At Post Conviction Hearing.

Petitioner called as witnesses during the hearing on his Motion for Appropriate Relief his two court-appointed defense attorneys, James Van Camp and James Griffin. Also, the entire trial transcript and record of the case was introduced. Pertinent portions of the testimony and exhibits introduced at the hearing are attached in an Appendix to this Petition.

DISCUSSION OF QUESTIONS PRESENTED

I.

WHETHER IT IS INEFFECTIVE ASSISTANCE OF COUNSEL FOR A DEFENSE LAWYER, WITHOUT THE DEFENDANT'S KNOWLEDGE OR CONSENT, (A) TO ARGUE AT THE CAPITAL SENTENCING HEARING THAT THE DEFENDANT IN FACT COMMITTED THE ALLEGED CRIME, AFTER HAVING DENIED THE CHARGES DURING THE GUILT-INNOCENCE PHASE; AND (B) TO CONCEDE THE EXISTENCE OF AGGRAVATING FACTORS.

A. How The Federal Question Was Raised And Decided Below.

Petitioner's contention that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendment to the Constitution of the United States was specifically raised in his Motion for Appropriate Relief and argued before the Superior Court. The Superior Court denied petitioner's contentions on this issue on the merits. (Appendix A, p. 1a).

On petition for certiorari to the North Carolina Supreme Court, this issue was specifically raised and briefed. The Petition for Writ of Certiorari was denied without opinion. (Appendix B, p. 9a).

B. Reasons For Granting The Writ.

A dilemma is presented to all defense counsel in a bifurcated capital trial when the jury has returned a verdict of guilty in the guilt-innocence stage and counsel must then argue for his client's life to the same jury during the sentencing phase. Defense counsel is presented with the choice of either continuing to insist on his or her client's innocence, and risk offending the jury, or agreeing that the jury has correctly decided the case. Petitioner contends that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments because one of his court-appointed counsel, without petitioner's prior knowledge or consent, repeatedly told the jury during capital sentencing that the petitioner in fact committed the murders, despite knowing that the defendant denied the charges.

Due to pre-trial publicity, the petitioner's trial was moved from Moore County to Union County, North Carolina. Less than one week before the trial, James E. Griffin of the Union County Bar was

appointed to represent petitioner as a co-counsel "for the primary purpose of assisting in the selection of the jury." (Appendix C, p. 10a). Mr. Griffin did not meet or talk with the petitioner until the night before the trial, as indicated by Mr. Griffin's testimony at the hearing on the Motion for Appropriate Relief. (Appendix C, p. 11a). Mr. Griffin testified that petitioner never admitted guilt to him. (Appendix C, p. 12a), and petitioner's chief defense counsel, James Van Camp, testified that petitioner had always maintained his innocence. (Appendix D, p. 14a).

Nevertheless, Mr. Griffin delivered the primary jury speech on sentencing and repeatedly told the jury that petitioner had in fact committed the crimes. Mr. Griffin's entire jury speech is included as Appendix E, with the pertinent portions underlined. For example, Mr. Griffin argued to the jury, "We don't know why he did it... I doubt anyone could go into his mind and tell us why he did it." (Appendix E, p. 23a), and further, "He may have committed a horrible crime and he did commit two horrible crimes, but he is still a living human being despite the blackness of the crimes that this man has committed." (Appendix E, p. 17a).

Petitioner had never seen Mr. Griffin until the night before his trial and it is not difficult to imagine his reaction to hearing one of his attorneys talk about the "black crimes" that he had committed.

The issue presented is extremely important because every capital defense counsel is presented with this same dilemma after the jury has convicted his or her client. The Superior Court, in denying petitioner's Motion for Appropriate Relief, said, "If defense counsel had indeed contended during the sentencing argument that the Defendant was innocent as to the commission of the offenses such an argument would have been a mockery of the jury for the decision which they had already made." (Appendix A, p. 6a). It is respectfully submitted that an attorney's duty of loyalty to his

or her client does not permit the attorney to concede a client's guilt, at any stage, without express authority from the client. Some guidelines are desperately needed from this Court about the limitations imposed by the Sixth Amendment on lawyers during capital sentencing arguments. It is possible for a lawyer to defer to the jury's verdict during argument and discuss why the defendant should not be put to death, without breaching the duty of loyalty.

Mr. Griffin testified, "As a general policy, I do not discuss my jury arguments with my clients." (Appendix C, p. 13a). Petitioner argues that the Sixth Amendment requires discussion with a client before an attorney may concede guilt to a jury during any stage of the proceeding.

Petitioner also contends that the Sixth Amendment does not permit an attorney to concede aggravating factors without the client's consent. During sentencing argument, Mr. Griffin conceded that the jury would answer "yes" to both aggravating factors. (Appendix E, p. 22a). Mr. Griffin did not recall ever having discussed aggravating factors with petitioner before his argument. (Appendix C, p. 13a). Under North Carolina's capital sentencing procedure, no person may be sentenced to death without the jury finding at least one of a list of aggravating factors. It is respectfully submitted that an issue of such importance should be discussed with a client before an attorney decides whether to concede an aggravating factor.

Petitioner is aware of no previous case in this Court dealing with the duty of loyalty to a client in the context of the capital sentencing hearing.

Defense lawyers will continue to be confronted with the issue of possibly offending a jury by advocating their client's innocence, and it is requested that the writ issue to set forth Sixth Amendment guidelines in this delicate area.

II.

WHETHER THE PROSECUTION, AFTER DETERMINING DURING VOIR DIRE THAT A POTENTIAL JUROR IS NOT A "WITHERSPOON-EXCLUDABLE," MAY CONTINUE TO QUESTION THAT JUROR ABOUT HOW STRONGLY HE OR SHE SUPPORTS CAPITAL PUNISHMENT FOR THE PURPOSE OF DECIDING WHETHER TO PEREMPTORILY EXCUSE THE JUROR.

A. **How The Federal Question Was Raised And Decided Below.**

In his Motion for Appropriate Relief, the petitioner specifically alleged that the jury selection procedure by the prosecution with respect to "death qualification" violated the Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States. The Superior Court denied the petitioner's contentions on the merits (Appendix A, p. 1a). The issue was again raised and briefed in petitioner's Petition for Writ of Certiorari to the North Carolina Supreme Court. That petition was denied without opinion. (Appendix B, p. 9a).

B. Reasons For Granting The Writ.

The petitioner contends that the manner in which the prosecution "death-qualified" the jury violated his right to trial by an impartial jury, in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

During jury selection, the prosecution inquired of all jurors whether they believed in capital punishment, as permitted by Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. However, on numerous instances, the District Attorney's inquiry went beyond whether a juror was potentially "Witherspoon-excludable" to questions about how long and how strongly the juror believed in capital punishment. For example, the following exchange took place between the District Attorney and juror Caldwell:

Q. "Mr. Caldwell, how do you feel about capital punishment? Are you for it or against it?

A. I am for it.

Q. I didn't understand you.

A. I said I'm for it.

Q. How long have been been in favor of capital punishment in some cases, Mr. Caldwell?

A. All my life, every time I hear tale of something like that, about all my life, I guess.

Q. That's what I wanted to hear, Mr. Caldwell." (Appendix F, p.47a).

It is respectfully submitted that there is no constitutionally permissible reason for the State to inquire into how firmly a juror believes in capital punishment. Portions of the jury voir dire pertinent to this issue are included in Appendix F, with revelant exchanges underscored.

Petitioner therefore urges that the writ be issued in order to define the outer parameters of the "death-qualification" process.

As the basic premise in discussing this issue, petitioner would adopt footnote 7 to Justice Rehnquist's opinion for the Court in Lockhart v. McCree, 476 U.S. ___, 90 L. Ed. 2d 137, 106 S. Ct. ___, (1986), which says in part, "the State must be given the opportunity to identify such prospective jurors ("Witherspoon-excludables") by questioning them at voir dire about their views of the death penalty." Lockhart, supra. Petitioner strenuously argues that once a juror is identified as not being a "Witherspoon-excludable" then the death-qualification process is over and no further questions should be asked of the juror about his or her views on the death penalty.

The peremptory challenge system is specifically endorsed by this Court with only narrow limitations. Batson v. Gregson, 476 U.S. ___, 90 L. Ed. 2d 69, 106 S. Ct. ____. However, it is necessary to discuss peremptory challenges to explain the potential for harm to a defendant by allowing death-questions beyond those necessary to determine if a juror is excludable for cause. There are only two legitimate reasons to allow parties to ask jurors any questions at all; to lay a foundation for challenges for cause, or

to obtain information helpful in determining whether to excuse a particular juror peremptorily. It is not necessary to have statistical studies to conclude that a jury composed entirely of persons who have firmly supported the death penalty all their lives is more likely to return a recommendation for death than a jury which may contain some jurors who have reservations about the death penalty but are not Witherspoon-excludable. The prosecutor in the present case was startlingly candid when he announced that what he wanted to hear was a juror say he had been in favor of the death penalty all his life. The primary thrust of the prosecutor's entire voir dire examination was to determine how firmly each juror believed in the death penalty, and if a juror expressed any reservations about capital punishment, he or she was peremptorily excused. (Appendix G, p.74a).

If a juror even indicated uncertainty about the death penalty, he or she was excused. Juror Beaver was asked:

Q. "Mrs. Beaver, having sat here for some several minutes in this courtroom today, you know what we are here for?

A. Yes.

Q. Having thoughts about capital punishment, at least I would assume here today, and no doubt having thought about it in the past, do you know your mind about that question?

A. I'm afraid I don't.

Q. Afraid you don't?

A. No.

Mr. Lowder: The State will excuse Mrs. Beaver with our thanks." (Appendix F, p.69a).

The following two exchanges clearly indicate that the prosecutor's intent was to select a jury composed of jurors with no hesitation about imposing the death penalty.

Q. Mrs. Pope, do you know your mind to the extent of saying whether or not you believe in capital punishment?

A. I do.

Q. Have all of your adult life?

A. Yes, sir.

Q. And if ultimately you are called upon after a proper instruction by the Judge to carefully consider what should happen to, to determine life or death, that wouldn't bother you unduly, will it?

A. No, sir. (Appendix F, p. 52a).

The prosecutor has turned the death-qualification process completely inside out, as illustrated by his remarks to the entire panel:

"We want to know if you do in fact believe in capital punishment, not wavering. We want to know at the outset, that is when we approve you as a juror, if we do, that you surely do believe in capital punishment in some cases, and that you can, if necessary, make a decision that would involve capital punishment." Appendix F, p. 64a).

After juror Williams said he believed in capital punishment, the prosecutor asked him if he had the "strength and fortitude" to render a death verdict without "any doubt." (Appendix F, p. 68a).

The Constitution prohibits a jury deliberately tipped toward death. Witherspoon, supra. Petitioner argues that a "hanging jury" is still a "hanging jury," no matter whether it is selected through the use of challenges for cause or peremptory challenges. Defense counsel never even questioned a potential juror who had even the slightest reservation about imposition of the death penalty. Since the State is entitled to no more than knowing whether a juror would not follow the law and automatically vote against the death penalty, it is respectfully requested that this Court adopt a "bright-line rule" limiting the death-qualification procedure to the identifying and questioning only those jurors potentially excludable for cause.

III.

WHETHER THE PROSECUTION MAY ARGUE TO THE JURY AT CAPITAL SENTENCING THAT (A) THE DEFENDANT VIOLATED THE LAW OF GOD AS STATED IN THE BOOK OF EXODUS; (B) ALL PEOPLE IN THE COMMUNITY WANT THE DEATH PENALTY IN THIS CASE; AND (C) THAT WEBSTER'S DICTIONARY PROPERLY DEFINES CERTAIN AGGRAVATING FACTORS.

A. How The Federal Question Was Raised And Decided Below.

Petitioner's contention that the portions of the State's argument at capital sentencing challenged here violated the Eighth and Fourteenth Amendments to the Constitution of the United States was specifically raised in his Motion for Appropriate Relief and argued before the Superior Court. The Superior Court denied petitioner's contentions on this issue on the merits. (Appendix A, p. 1a).

On petition for certiorari to the North Carolina Supreme Court, this issue was specifically raised and briefed. The Petition for Writ of Certiorari was denied without opinion. (Appendix B, p. 9a).

B. Reasons For Granting The Writ.

The petitioner contends that during his jury argument at sentencing, the prosecutor exceeded the bounds of proper argument on three occasions in violation of rights of the petitioner secured by the Eighth Amendment.

First, the District Attorney pointedly argued that petitioner had violated "God's law" that "Thou shalt not kill." (Appendix H, p. 75a). He even went so far as to argue, 'Thou shalt not murder.' That is the law that applied to him on and before he killed these two victims. Thou shalt not kill. He violated the Commandments of God." (Appendix H, p. 75a). It is respectfully submitted that such arguments are constitutionally impermissible for several reasons. First of all, it is simply an erroneous statement of the law. Petitioner was charged with a violation of the criminal law of the State of North Carolina and should be judged solely on the basis of man's law, not God's law. A carefully structured capital sentencing procedure is in effect in North Carolina and nowhere does it say, "He that smiteth a man, so that he die, shall be surely put to death." (Appendix H, p. 75a).

Secondly, the prosecutor's argument attempts to shift the responsibility for the death decision from the individual jurors to the Bible and the Law of God, in violation of the principle announced by this Court in Caldwell v. Mississippi, 472 U.S. ____, 86 L. Ed. 2d 231, 105, S. Ct. ____ (1985). Caldwell holds:

> We conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.
>
> Caldwell, supra

In the "Bible belt" of the United States, arguments such as this one strike sensitive chords located deep within certain jurors. Since religious arguments quite naturally affect different jurors in different ways, depending on their own personal beliefs, arbitrariness and capriciouspess unavoidably re-enters the death decision process. When prosecutors make religious arguments, defense counsel is put into the delicate situation of having to decide whether to object to the reading of the Bible. Indeed, petitioner's trial counsel did not lodge an objection to the reading of Chapter 20 of the Book of Exodus.

Petitioner would argue that such failure to object in such a sensitive area should not constitute a waiver of this exception.

Petitioner does not make a First Amendment argument even though it could be said that to allow a prosecutor to argue that Biblical law applies to a criminal defendant impermissibly entangles church and state. Rather, petitioner relies on the jurisprudence of the Eighth Amendment and its need for reliable, individualized and non-arbitrary decisions.

The prosecutor also argued that "The People" wanted the death penalty in this case. He told the jury:

> We don't want life imprisonment. We want the death penalty, folks, and I'm speaking for the people, not for Carroll Lowder. The people. You know what the people think.
>
> (Appendix H, p.76a)

Again, this type of argument is a deliberate attempt to diminish the responsibility of the individual jurors by making them

think that everyone in the community wanted the death penalty in this case. Even more serious than the diminishing of responsibility is the inference that if the jurors do not return a death verdict, that they themselves are guilty of contradicting their fellow citizens, as well as violating God's law. In other words, the prosecutor is arguing that it is the directive of both God and the community that the jurors return a death verdict.

The petitioner urges that this argument of the prosecutor be looked at in the totality of circumstances of the entire trial. As argued in the previous section, the jury selection by the prosecution was focused on identifying which jurors had strongly held beliefs in favor of capital punishment. By asking questions about how long jurors had believed in capital punishment, the prosecutor could select a jury, through peremptory challenges, composed of individuals receptive to the argument that "the people" wanted death in this case. As he argued, "What percentage of the people that you heard talk about it up here believe in capital punishment? 90 percent. What do the people want, folks, when you have this evidence and this law? You want your lives to be secure." (Appendix H, p. 76a).

Capital sentencing decisions should not be based on speculation of what "the people" want, but whether twelve jurors find that death is warranted within the confines of the law. In a very real sense, it is the twelve people in the jury box who are "the people" in this context, not the rest of the population of Union County.

Lastly, the prosecutor read to the jury from Webster's dictionary in order to explain the meaning of "heinous, atrocious, and cruel." The prosecutor read to the jury every single synonym for these three words, right down to "atrocious" meaning "in bad taste." (Appendix H, p. 78a). The trial court correctly defined the three terms during his charges. (Appendix I, P. 80a). However, it is submitted that the prosecutor's improper argument could have influenced the jury to apply a less strict standard to the case. There

is a wide disparity between cruel meaning "vexing" and "designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others." (Appendix I, p.80a).

Death sentences should be imposed within the guidelines set by the legislature and the courts and not the Merriam-Webster Company.

For all of the reasons set forth above, it is requested that the writ issue to review the sentencing hearing argument of the prosecution.

IV.

WHETHER THE DEATH PENALTY IS DISCRIMINATORILY APPLIED AGAINST BLACK DEFENDANTS WHO ARE CONVICTED OF KILLING WHITE VICTIMS.

A. How The Federal Question Was Raised And Decided Below.

In his Motion for Appropriate Relief, petitioner specifically alleged that the death penalty was discriminatorily applied against black defendants convicted of killing whites, in violation of the Eight and Fourteenth Amendments. The Superior Court's Order found as a fact that petitioner had abandoned the claim. (Appendix A, p. 4a). Petitioner sought review by the North Carolina Supreme Court on the same grounds and further alleged the Superior Court erred in finding as a fact that petitioner abandoned the claim. The Petition for Writ of Certiorari was denied without opinion. (Appendix B, p. 9a).

B. Reasons For Granting The Writ.

In petitioner's Motion for Appropriate Relief, he designated this claim as V-A. The Order of the Superior Court found that petitioner abandoned the claim. (Appendix A, p. 4a). In fact, counsel at the hearing simply stated that he would not make oral argument of the issue. (Appendix J, p.81a). In no way was petitioner abandoning the issue. The Defendant is black and the victims were white. In light of this Court's accepting the case of McCleskey v. Kemp, 85-6811, for argument, petitioner requests that the writ

be granted and this claim be remanded to the Superior Court for appropriate findings of fact.

CONCLUSION

Petitioner urges that this Court grant review to deal with issues of broad and significant impact on death penalty litigation. Almost all capital defense lawyers will sooner or later find themselves in the unhappy situation of preparing for a second jury argument in front of the same twelve people who have just convicted his or her client. Guidelines are needed to define the constitutional obligations of a lawyer to his or her client in deciding what to say to that jury.

Further, this case presents an opportunity to define what has been commonly called "death-qualifying" a jury. There are legitimate interests of the State to be served by allowing prosecutors to inquire about opinions on capital punishment. However, there is also potential for abuse.

The scope of permissible jury argument in capital sentencing hearings should also be defined, in order to insure the principled verdicts the Constitution requires.

For all these reasons, petitioner requests that this Petition be granted.

Respectfully submitted,

POLLOCK, FULLENWIDER, CUNNINGHAM & PATTERSON, P.A.

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July 29, 1986

APPENDIX

EDITOR'S NOTE

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86-5234

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October Term, 1985

DAVID J. BROWN,

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v.

STATE OF NORTH CAROLINA,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF UNION COUNTY

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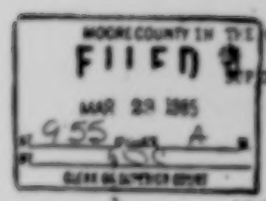
ATTORNEY FOR PETITIONER

83-1

APPENDICES

Appendix A

STATE OF NORTH CAROLINA
COUNTY OF MOORE



IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

80 Cro 7833
80 Cro 7834

State of North Carolina
vs.
David J. Brown, Defendant

ORDER

This action for appropriate relief coming on to be heard and being heard on October 3, 1984, at the October 1, 1984, Criminal Term of Superior Court for Moore County; and the defendant being present in open court and represented by his attorney, Mr. Bruce Cunningham; and the State being represented by Mr. Carroll Lowder; and from the record in this matter and evidence presented during the course of this hearing, the Court makes the following findings of fact and conclusions of law. It is to be noted that the defendant did not testify at this hearing.

FINDINGS OF FACT

1. At the trial of these actions the defendant was found guilty of two counts of first degree murder. It was the recommendation of the jury that the defendant be sentenced to death for both convictions, and a death sentence was imposed for each conviction. Both the crimes occurred in Moore County, but the trial was moved to Union County.

2. James VanCamp of the Moore County Bar was appointed to represent the defendant. Mr. VanCamp has been practicing law for more nineteen (19) years and has served as President of the Moore County Bar Association, as vice-president and president of the North Carolina Academy of Trial Lawyers, as the Chairman of the N.C. Crime Commission, and as an

executive director of the Governor's Commission on Law and Order. Mr. VanCamp has defended over forty (40) homicide cases and that at least half of those were tried before a jury.

Mr. VanCamp requested that Douglas Gill of the Moore County Bar, a member in Mr. VanCamp's firm, be appointed to assist him and his appointment was made by the Court. Mr. VanCamp further requested that Mr. James Griffin of the Union County Bar be appointed to assist him as the case would be tried in Union County, and Mr. Griffin was appointed by the Court. Mr. VanCamp considered both of these attorneys to be skilled attorneys.

Mr. James Griffin has been in the practice of law for twenty-nine (29) years.

3. Mr. VanCamp spent some 1,000 hours in the investigation of this matter prior to trial, and that in his opinion all three attorneys did everything they knew to do to represent the defendant in this matter.

4. When Mr. VanCamp interviewed the defendant, the defendant could not remember all of the events of the morning when the crimes occurred, and the defendant told him that on that morning he woke up in a strange room and then went some distance and found himself in his apartment. Mr. VanCamp determined that it would be impossible for the defendant to say where he was during the critical hours and that the thrust of the defense from the outset was to try to save the life of the defendant.

5. Mr. VanCamp attempted to speak with law enforcement officers prior to trial, including blood experts, serologist, and finger-print experts. That none would talk with him and he was told by them that permission from the District Attorney would have to be obtained as the District Attorney had told them not to discuss the case.

6. That the State excused some jurors who had reservations about the death penalty after inquiring as to their feelings concerning the death penalty. That the State also excused some jurors who had no reservations about the death penalty. That in so doing the State was, as a matter of right, excercising peremptory challenges granted by statute, and the number of peremptory challenges allowed by the statute was not exceeded.

7. That there has been no evidence presented showing that the State excused all jurors who were black, and this allegation is deemed abandoned.

8. That the jury was selected in the manner prescribed by statute and case authority governing the same.

9. That the trial court denied defendant's motion for a second jury to determine the issue of punishment.

10. That the State denied to the defendant access to the crime scene prior to trial; that the District Attorney's office advised S.B.I. officers not to provide information to defense counsel. However, the officer in question was a fingerprint examiner, and the prints lifted at the crime scene and latent prints were shown by the officer to one of the defendant's attorneys. That no preliminary hearing was held in this matter, and that the scheduled hearing was continued for two weeks on motion of the State, and a true bill of indictment was returned in the interim. That a witness, Clarence Harding, was moved from one location to another so that he would not be again approached by the defense counsel. That Mr. Harding had been interviewed by counsel for defendant prior to the move.

Counsel for defendant made diligent efforts to view the crime scene prior to trial, to interview all witnesses, and to have a preliminary hearing conducted.

11. That there has been no showing that the defendant was not fully advised as to what the defense theory would be. The defendant was advised by Mr. Griffin that they would have to depend on inconsistencies in the State's case.

12. That Mr. Griffin talked with the defendant as to whether he would testify during the sentencing hearing. There has been no showing made by the defendant that he was not informed or did not know that the decision whether to testify during the sentencing hearing was his to make.

13. That in his argument to the jury during the sentencing phase of the trial, Mr. Griffin stated that the defendant committed the crime. That Mr. Griffin argued to the jury during the guilt phase of the trial that someone else could have done it, and argued at sentencing that the defendant did it.

14. That Mr. Griffin conceded the existence of aggravating factors in his argument on sentencing. No evidence has been offered by the defendant as to whether this was discussed with the defendant prior to argument. That no evidence has been presented by the defendant as to whether Mr. Griffin discussed with the defendant prior to argument on sentencing that he would concede in his argument that aggravating factors were present.

15. That Mr. VanCamp was absent from the courtroom while Mr. Griffin was arguing to the jury during the sentencing phase of the trial. Co-counsel, Mr. Gill, was present. Mr. VanCamp also made an argument to the jury during the sentencing phase of the trial.

16. That no challenge to the jury array was made prior to trial.

17. That the defendant's claims denoted as V-A and IV-J were abandoned by the defendant.

18. That the record does not reveal that the jury was presented with a multitude of defenses that were inconsistent with each other.

19. That during sentencing the District Attorney read to the jury from the Bible and stated that the defendant had violated the commandments of God. He also argued, "we want the death penalty, and I'm speaking for the people, not for Carroll Lowder. The people. You know what the people think...This is the case to act on, folks, not for Carroll Lowder, no, but for all the people." It was further argued, "Do you know anything in this case that indicates that he really has any pangs of conscious?" Counsel also argued from Webster's dictionary to define "heinous, atrocious, and cruel."

Based upon the foregoing findings of fact the Court hereby makes the following

CONCLUSIONS OF LAW

1. That no constitutional right of the defendant was violated by the manner in which the State exercised it's peremptory challenges.

2. That no constitutional right of the defendant was violated by the jury selection process.

3. That no error was committed by the trial court in it's denial of the defendant's request that a second jury be empaneled to determine the issue of punishment, and no constitutional rights of the defendant were violated by the denial.

4. There was no constitutional requirement for a preliminary hearing or probable cause hearing in this matter. The Supreme Court has previously held that the denial of access to the crime scene amounted to a denial of due process of law; but that said denial was harmless beyond a reasonable doubt.

That under the facts of this case there has been no showing that the constitutional rights of the defendant were violated by the District Attorney's office instructing officers not to give information to the defense attorneys and by the removal of a State's witness from one location to another.

The defendant was not denied the effective assistant of counsel as a result of these actions on the part of the State.

It appears from the record in this matter that full discovery was made and that the requisite disclosures as required by statute were made by the District Attorney's office. There has been no showing that any evidence favorable to the defendant was withheld and not made known to the attorneys for the defendant. The actions of the District Attorney's office did not rise to the level of prosecutorial misconduct.

5. That Mr. Griffin's stating to the jury during the argument on sentencing that the defendant committed the crimes did not constitute ineffective assistance of counsel as the argument was reasonable. The guilt or innocence phase of the trial had been completed and the jury had already spoken as to the defendant's guilt. The State presented evidence at the sentencing hearing in the form of an admission from the defendant that he had killed two people and didn't understand why his ring had not been given back. If defense counsel had indeed contended during the sentencing argument that the defendant was innocent as to the commission of the offenses, such an argument would have been a mockery of the jury for the decision which they had already made.

A reviewing Court should be extremely hesitant to second guess the wisdom of the approach taken by seasoned counsel in his argument to the jury. If indeed counsel had contended during the argument on sentencing that the defendant did not commit the crimes, the jury may well have questioned the sincerity and credibility of counsel's argument in his efforts to save the life of his client.

6. That Mr. Griffin's conceding the presence of aggravating factors did not constitute ineffective assistance of counsel. As above reasoned, a reviewing court should exercise caution in questioning the trial tactics of counsel. A review of the record in this case strongly indicates that a reasoning jury would find the aggravating factors of "especially heinous, atrocious, and cruel" and "course of conduct."

Mr. Griffin strongly argued the presence of mitigating factors in an effort to spare the defendant. This argument in mitigation may have been diluted had he not conceded the presence of aggravating factors.

7. That Mr. VanCamp's absence from the courtroom during Mr. Griffin's argument on sentencing did not rise to the level of unreasonable conduct on the part of Mr. VanCamp.

8. That the failure of counsel to challenge the jury array did not amount to unreasonable conduct by counsel. There has been no showing at this hearing as to the array of the jury in the trial of this action and, therefore, no prejudice to the defendant has been shown.

9. That counsel is allowed wide latitude in arguing to the jury. That permissible bounds of fair argument were not exceeded by the District Attorney's argument which implied that the people wanted the death penalty and by his reading from the Bible and Webster's dictionary. The District Attorney did not comment on the defendant's failure to take the stand by stating, "Do you know anything in this case that indicates that he really has any pangs of conscious?"

Since these arguments were within the scope of allowable argument, failure of counsel to object to them did not constitute ineffective assistance of counsel.

10. The defendant has failed to show that counsel's performance was deficient in any way. The defendant was not denied the effective assistance of counsel.

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that the relief prayed for be and the same is hereby denied.

This the 27 day of April, 19 85.

Judge of the Superior Court

Appendix B

No. 30A86 TWENTIETH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v

DAVID J. BROWN

From Union

(83CRS 9743 & 9744)

ORDER

Upon consideration of the 2nd petition filed by Defendant in this matter for a writ of certiorari to review the Superior Court, Union County, the following order was entered and is hereby certified to the Superior Court of that County:

"Denied by order of the Court in conference, this the 3rd day of June 1986.

s/ Billings, J.
For the Court"

Accordingly, the stay of the defendant's execution entered by this Court is hereby dissolved, effective the 3rd day of June 1986. The cause is remanded to the Superior Court, Union County. The District Attorney shall promptly calendar a hearing, as required by G.S. 15-194, to fix a new date for the execution of the original sentence.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of June 1986.

J. GREGORY WALLACE
Clerk of the Supreme Court

TRUE COPY
J. GREGORY WALLACE
CLERK SUPREME COURT
BY [illegible] DEPUTY CLERK

Copy to:
Mr. Bruce T. Cunningham, Jr., Attorney at Law, for the Defendant
Ms. Joan H. Byers, Special Deputy Attorney General, for the State
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
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I have handed Mr. Griffin a copy of the document submitted to the Court as an affidavit in support of Counsel fees indicating time involved in the case.

Q Have you had an opportunity to review that document?

A Yes, sir.

Q And is it your best recollection that you first became involved in the case approximately November 20, 1980?

A That is correct.

Q And how did you learn of the request to have you involved in the trial?

A I believe Mr. Van Carp had called me previous to me becoming appointed to ask would it be agreeable with me, and then he called me on a brief call to say I had been appointed and that we would get together later.

Q And what was your understanding about what your goal would be in the trial of the case?

A It was my understanding at that time primarily jury selection.

Q Have you practiced criminal law in Union County for the entire time you have been practicing law?

A Save and except for about a 6 to 8 year period when I was Judge of Union County Recorder's Court and I was barred from the practice of criminal law.

Q So it's fair to say, is it not, that initially you were contacted with respect to jury selection?

file accurately reflect the time that was spent by you in preparation for the case?

A No, sir; it will not. I am the world's worst record-keeper, and I spent manyhours, or some hours, on this that would not be reflected in this.

Q My question is: Prior to December 7 did you have an occasion to see Mr. Brown? Do you recall when you first met with Mr. Brown?

A I did not see him prior to -- I don't know whether it was December 7 or not, but I did not see him until he was in Union County for the purposes of trial. My best recollection is Mr. Van Carp and I went to the Union County Jail on Sunday night before the trial was to start Monday morning and met with Mr. Brown.

Q What was the purpose of the meeting at that time?

A Mr. Van Carp wanted me to meet Mr. Brown so I could have some understanding of our client, better knowledge of him, of his appearance, of his general demeanor and so forth in order that I might better pick the jury.

Q Was there any discussion at that time concerning the proposed defense that would be entered on behalf of Mr. Brown?

A Yes, there was some discussion.

Q And what was your understanding as to the defense that would be presented?

A My understanding of the defense that would be presented wa

1. Although the decision was not hard and fast at that time, but probably that Mr. Brown would not testify; that he could not testify with great certainty as to where he was during the time frame in which the State was contending that the crime occurred; that we were going to have to depend a great deal on weaknesses and inconsistencies in the State's case, and I am not sure at that time that even Mr. Van Camp and I knew about this witness that was seen jumping from the balcon We might have, but I'm not sure. It seemed to me like even we got that information after the trial started. I am not sure about that.

Q At any time during your conversation with Mr. Van Camp an Mr. Brown at the jail did Mr. Van Camp tell you that David Brown had admitted any guilt in the matter?

A No, sir.

Q During your conversation with Mr. Brown yourself did he admit --

A No, sir. Throughout my knowledge of this case it was always Mr. Brown could not say with certainty where he was during the time frame that it would have had to have occurred. He never admitted his guilt to me.

Q Now, during the jury selection process was part of your purpose to introduce the jury to the respective defense?

A I do not recall, but it always is, and I'm sure it was in this case. I don't have any independent recollection of i

Mr. Brown, or the three of you?

A Me, Mr. Van Camp, Mr. Gill and Mr. Brown. If I remember correctly I never discussed anything with Mr. Brown except with Mr. Gill and Mr. Van Camp.

Q Did you discuss with Mr. Brown the nature and content of your jury argument during the sentencing phase of the trial?

A I seriously doubt that I did. I do not recall it, and I doubt that I did.

Q Do you recall conferring with Mr. Brown concerning whether or not certain aggravating factors would be -- how aggravating factors would be handled in your jury argument during sentenci

A No, sir. I do not recall it with Mr. Brown, and as a general policy I do not discuss my jury arguments with my clie

Q And you previously indicated at your November 26 conversation it was mentioned by Mr. Van Camp that you may be involved in more than the jury selection aspect of the trial.

A I don't know whether it was mentioned by Mr. Van Camp, or whether I said should I or shouldn't I, but it was brought up.

MR. CUNNINGHAM: One moment. (Pause.) Thank you. No further questions.

CROSS EXAMINATION by MR. LOUDEN:

Q Mr. Griffin, do you have an independent recollection as to when it was that you and Mr. Van Camp and Mr. Gill had knowledge of the aggravating factors which the State contende

defense theories you were considering as possibilities in the case and were under consideration throughout your investigation of the case?

A Yes. The fact there was evidence even by the State that my client, Mr. Brown, had taken some form of drugs that evening had in fact had some alcohol. If I recall correctly the officers indicated he seemed inebriated or not under control. That was the reason for taking him back to the hotel and not dropping him off on a highway and led us to the conclusion that one defense theory could be unconsciousness: that if he did do it he was not conscious at the time: and therefore that would be at least a mitigation or a defense to the crime.

Q Did you discuss the possibility of this defense with Mr. Brown?

A Yes, in this form: Mr. Brown denied at all times that he had anything to do with the killing of these two people, and in this there I am telling you about if you think about it you kind of have to admit you did it or you were unconscious. He never admitted and would not have any belief, or have any belief that he did it so therefore that type of theory would almost require him to come to the conclusion that he did it, and he said he truthfully did not do it.

Q Now, after the guilt or innocence phase and the case was presented to the jury on sentencing phase, in the division of services whose responsibility was the presentation of the

a verdict of capital punishment.

I thank you for your time and attention.

COURT: Members of the jury, you have been sitting there about an hour. You want to take a recess now? All right, take a ten minutes recess, whatever time is necessary. Be back in ten minutes.

NOTE: Recess over. All parties in the courtroom.

JURY RETURNED.

MR. JAMES E. GRIFFIN'S ARGUMENT TO THE JURY:

Your Honor, Mr. Gill, Mr. Lowder, Mr. Church, Mrs. Shelton, ladies and gentlemen of the jury, I wish that I thought I could get up here and give to you a well reasoned speech. I wish that I could get up here and give you a speech without emotion. I can't. As Mr. Lowder told you, I may shed a tear. I don't doubt that. I am an emotional man. I live somewhat by my emotions. I am not shedding a tear for David Brown. I don't want you to think that I am. I am shedding a tear, if I do, for everything that has happened, for Diane Chalfinch, for her daughter, for her mother, for her father, for everything that has happened.

I want to clear the record of one thing, though. Mr. Lowder says take this man's life for Diane Chalfinch and her daughter. There is nothing we can do for Diane and her daugh regardless of what we do. They have gone home to their final

reward. They're in the arms of their Lord that we all believe in. Taking this man's life won't bring them home and put them in the arms of their mother and father another minute. Would give them another breath. They wouldn't see another ray of sunshine. If it would, I'd write the death penalty in here, but that's not what we are talking about. They are gone. Nobody can help nor hurt them anymore. No one here on this earth can. [We are talking about what is going to happen to th man who did it, and that's all we're talking about.] Mr. Lowd said that the public expects us to do it and the public expect it. Once again that is not what we are here for. We are not here to do what the public expects us to do. We are here to do what the law and what is right and what is wrong.

It is almost Christmas time on the 25th, 5 days from now we will celebrate the birthday of Jesus. Mr. Lowder says if you kill this man, or if you vote for the death penalty, t it will be popular. I want to remind you that perhaps the most popular conviction in the history of mankind was the crucifixion of Jesus Christ. That is not to compare David Brown in any way to the crucifixion, but it is to say that popularity does not make it right.

My argument may be long today and I hope you will exc me if it is. We are debating a man's---whether a man shall live or die, and [regardless of what David Brown has done,] he is a human being. He has a soul the same as any other human

being that sits in this courtroom. [He may have committed a horrible crime, and he did commit two horrible crimes, but he is still a living human being with a soul despite the blackness of the crime that this man has committed. Despite it all,] he is still a human being.

You may say why should the life of David Brown be spared. I think there are many reasons to spare the life of David Brown. [The main reason is this; here sits a man thirty-two years of age and in those thirty-two years he did not transgress the law.] In those thirty-two years he lived as most of us would think a person should live. He went to work; he made a living; he was good to his mother. And Mr. Lowder says well he's good to his mother and helps someone across the street occasionally, something of this nature, but he lived for thirty-two years as fairly normal human beings live. That is what we are talking about mitigating circumstances. [He did not transgress the law for those thirty-two years, and then on this horrible night something happened.] I don't know what happened. I don't think anyone of us can know what happened, because [I don't think anyone who lives a rational life or who thinks rationally and lives normally can go inside the demente mind that did this, but it was one night out of thirty-two years, one brief span of time out of thirty-two years. How long could it have been at the most, an hour, thirty minutes, out of thirty-two years?] He says if you are not going to

kill, take a man's life at a time like this, when are you going to ever take it? I say to you that the death penalty was not made for cases like this. I say to you that the death penalty and the Legislature meant for the death penalty to be applied when we had a cold, calculated, thoughtout crime where a man thinks about it before he does it, [not for a man who due to some twist and turn of his brain and his soul is demented,] but a cold, calculating crime. That does not negate the horribleness of this crime, but I say to you that that is the kind of crime that the death penalty was made for. Mr. Lowder says we are all bound by the law, and sympathy, prejudi should not enter into this case, and that David Brown should suffer the same as any other person who has done the same. If that were the case, once again I would say do it, but you k and I know and you can take into account your own personal experiences, that that does not happen. That there may be many who have committed the same crime before and convicted who have not suffered it. Mr. Lowder said that and he brough to the fact the attention that you were raised on the farm, and what was reasonable to assume your training was, if you w raised on the farm. Let's think about that a minute. I know what your training was. I know what it is to be raised on a farm. I know how you were raised. Let's think about how you were raised. I'm sure that you were raised with hard work. You were raised to believe in God. And that one law above al

others avails in your mind, and it should, and that is the law that you find in the Bible which Mr. Lowder read. It should and I'm sure that it does. Let's think about what we find in the Bible for a minute here today. If you go to the Bible, I believe it is in Genesis 4 we find perhaps the recordation of the first murder where we see the story of Cain and Abel, and we'll see that when we talk of murder we are not talking of something new. We are talking about something that has been with mankind for a long time. It is in Genesis 4, starting with the 8th verse. Let's read this, and Mr. Lowder has said the Lord believes in this. The Lord says this, or the Bible says this. Let't go to the Bible and let's read what punishment the Lord put upon a man who killed his own brother. We go to the 8th verse, the 4th Chapter of Genesis, and it says, "And Cain talked with Abel his brother; and it came to pass when they were in the field, that Cain rose up against Abel his brother, and slew him. And the Lord said unt Cain, where is Abel thy brother? And he said, I know not. Am I my brother's keeper? And he said, what hast thou done? the voice of thy brother's blood crieth unto me from the earth. And now art thou cursed from the earth which hath opened her mouth to receive thy brother's blood from thy hand. When tho tillest the ground, it shall not henceforth yield unto thee h strength. A fugutive and a vagabond shalt thou be in the ear And Cain said unto the Lord, my punishment is greater than I

can bear. Behold, thou hast driven me out this day from the face of the earth; and from thy face shall I be hid; and I shall be a fogitive and a vagabond in the earth; and it shall come to pass that every one that findeth me shall slay me. And the Lord said unto him, therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold." That's where the Lord judged a man who killed. There is where the Lord judged a man who killed his own brother. The Lord made him a vagabond on this earth, and the Lord said that the earth would never give him the strength, its strength, but the Lord did not kill that man, and that is the judgment that the Lord put on a murderer. I thought it was right amazing that it talked about the blood, and we have heard about much blood here. If you go further in the Bible, you would see that in Genesis 2 that it says, "And the Lord God formed man of the dust of the groun and breathed into his nostrils the breath of life; and man became a living soul." He did not say some men; he did not say that those men who follow His ways became a living soul. All men became a living soul and [that David Brown despite wha he did became a living soul and is a living soul.]

Mr. Lowder further read from the Old Testament and went on to the New Testament and read what Jesus said. You would see that he later said that somewhere in Matthews he said that you have heard the old law or you have that it is t be an eye for an eye and a tooth for a tooth, but I say unto

you resit not evil. So we see, I don't believe that we can justify, that's what we're trying, the word we're trying to use, we can justify the taking of David Brown's life or any man's life from the Bible, but let's move on to this specific case that we're talking about here today.

Mr. Lowder has told you there are going to be submitte to you certain issues, and they are a little bit complex, but eventually you are going to come to a place in these issues where it says, "We, the jury, unanimously recommend that the defendant, David J. Brown, be santenced to---", and you all will write into that space one of two things, life imprisonmen or death. Or death.

Now, there will be two of these forms, one for Diane and one for Christina Chalflinch, and I want to point out that this is a little bit different from a verdict in the sense of the word that when you were debating David Brown's innocence or guilt, if either one of you, it had to be unanimous, if it was not unanimous, and you all could not have reached an agreement, you would have come back into the court and His Honor would have withdrawn a juror and declared a mistrial. Then the matter could have come on to be tried in front of another jury. That is not the case in this instance where we are debating the life or death of a man as we are here. If either one of you, if one of you says no, and you cannot reach a unanimous decision, you are not dismissed and another jury

empanelled, but if one of you says no, this man is not to suffer the death penalty, then he receives life imprisonment. So it is up to each and everyone of you individually.

Now, then, before you get to that question, that is, the ultimate and the final question, but before you get to that, you are going to have to answer several questions. I want to go through them with you for a few moments and give you our contentions as to how we feel they should be answered and try to show you why we feel that they should be answered under the evidence as it has come from the witness stand. You start out and it says, "Issue One. Do you unanimously find from the evidence, beyond a reasonable doubt, that the following aggravating circumstance, or circumstances, existed at the time of the commission of this murder?" Then there are two of those what they call aggravating circumstances. The first is, "Was this murder especially heinous, atrocious or cruel?" I would be a fool if I stood here and told you you should answer that issue no. There is no question about it. [I think that you are going to answer that issue "Yes". I don't think that is any question about it.] The next question is,["Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against another person?" Once again I don't think there is any question you're going to answer it "Yes"] but then we come to the issues that

count. If you answer those issues no, that would end it then and there. Then you come to another question, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance, or circumstances, found by you is sufficiently substantial to call for the imposition of the death penalty?" Now, let's discuss it for a moment. You have heard about the crimes that were committed on this day. [No question they were horrible, but remember all of the evidence and I ask you to recall it, he didn't do it for money, he didn't do it for personal gain, he didn't sit down over a period of weeks or months and plight. We don't know why he did it, and I agree with Mr. Lowder, if you brought in a psychiatrist, I seriously doubt that anyone could go into his mind and tell us why he did it] and that's one of the reasons when looking at the crime I say to you that the death penalty should not be imposed. I think and I contend to you that the death penalty should be imposed in cold, calculating crimes where a man sits down and says I'm going to kill this person, or I'm going to rob a person, and during the course of the robbery someone is killed. I say to you that is what I think that the Legislature, and we contend what the Legislature meant when it was talking about imposing the death penalty, but let's assume for a moment that you disagree and you say, no way am I going to go buy that argument, if it isn't in that crime, it shouldn't ever be and you answer that issue "yes". You then go to the next issue, "Do you find

one or more mitigating circumstances?" And then there is set out what the Legislature and what the law says mitigating circumstances are, and I want to go through them with you. The first one is, "Does the defendant have no significant history of prior criminal activity?" There is no way that you can find that this man has had any history of prior criminal activity. There is no evidence, there is no history of signific criminal or prior criminal activity. You must answer, if you believe everything that you have heard, you must answer that issue "yes", he has no significant history of prior criminal activity, and we're getting them in the negative, and I understand it, but it is the best we can word them. But the question is and the Legislature has said when you are considering whether or not you put a man to death for murder, you look into his past history, and if he hadn't had any criminal activity, criminal or significant criminal activity, then you give him credit for it. That is one of the things the Legislature said you give him credit for. The second one, "Was the capacity of the defendant to appreciate the criminality of his conduct to conform his conduct to requirements of law impaired?" [Going to the question of whether or not due to the fact that the man had drank considerably and taken Black Beauties, did that impair his ability?] You heard the evidence, 6 Black Beauties, some whiskey, some beer, some wine. We say that should be "yes". [It has been impaired or was impaired at that time.] The third one,

and I want you to listen carefully to the third mitigating circumstance, and this is why we put the evidence upon the stand that we did in this hearing. "Consider whether although the act itself may have been horrible," and nobody disagrees it was a horrible act, "the defendant has not shown himself to be otherwise evil." You say it fits this case and fits it perfectly. [We have the case of a man who has lived thirty-two years and not the first piece of evidence of an otherwise evil act.] So I don't think there is any way you can get around saying that although this is a horrible crime, the defendant has not shown himself to be otherwise evil. The next one, "Consider whether the defendant has no previous conviction of offenses involving injury to another person." Not only does this man have no history of being convicted of any crime that involved injury to another person, there is no evidence that he ever threatened anyone, that there was ever an act of violence on his part, not only were there no acts of violence, there have been no threats of violence, none whatsoever, not the first one, not the first one. Mr. Lowder keeps saying the law, the law, the law. The Legislature has said that these things go to mitigating a horrible crime or mitigating the punishment. Think on it. Not the first one. They say has never been convicted, not only has David Brown never been convicted, there's never been an act of violence, a threat of violence before this time. Number 5. "Consider whether the prior acts of

behavior are not consistent with the acts he was convicted for in this case." What they're saying there is this, [if a man goes through life nonviolent, doesn't hurt anyone and suddenly due to some snap in his brain or due to some quirk or due to something he turns violent and he kills someone, you must take into consideration the fact that he has lived for thirty-two years and never done it before or threatened to do it before.] Once again, not Jim Griffin, not what I think or I don't think, but the law, and the Legislature said that you would take those into consideration. And the 8th one, "You may consider any other circumstance, or circumstances, arisin from the evidence which you deem to have mitigating value." I say to you, ladies and gentlemen of the jury, that the answer to all those questions should be "yes". That they all or all of the evidence shows not a man who has lived by violence or lived by the sword all his life, but a man who has lived for thirty-two years. We attempted, and I think we did, and I hope we did, [we attempted to go back and show you want kind of man David Brown was up until the time this horrible crime occurred.] Th does not excuse the crime. We are not asking you excuse the crime on the basis of that. All we're saying is and all we're asking you to do is to say that that was sufficient mitigation to imprison this man for the next two hundred years, if he shoul live that long, rather than to take his life, and that's all. We are not saying excuse the act, and we are not saying it does, but [we're saying that these circumstances should mitigate what]

[what the man did to that extent.] Once you answer those, then you come to one of the crucial issues and the crucial issue before you write in your final answer, and it is Issue Four. "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance, or circumstances, found by you outweigh the mitigating circumstance, or circumstances, found by you?" If you answer that issue "No", as we say that you should, then you write in "life imprisonment" on the back. If you answer that issue "Yes", then you write in "death".

I would remind you that this is, as in every other case, that the burden is upon the State of North Carolina to satisfy you beyond a reasonable doubt, which is you are fully satisfied or satisfied to a moral certainty that the aggravating circumstances outweigh the mitigating circumstances. I ask you to consider them all. Think back what has come from the witness stand.

I want to say one thing. Mr. Lowder put upon the stand, if you remember him, a Brown man, who said he heard certa things. Why the man was put upon the stand, I don't know. I have practiced law for twenty-five years. I have lived by the system that we have, I have no quarrels with it, and David Brown came into this courtroom two weeks ao, he was presumed innocent until the State of North Carolina proved him guilty. You all have found him guilty beyond a reasonable doubt. I don't quarrel with that one bit. You did what you had to do, and I don't want you to think I'm quarreling with it. So what Mr.

Brown said has nothing to do with this case whatsoever or with the mitigating or aggravating circumstances. It went to his innocence, or excuse me, yes, it was Mr. Brown that took the stand, has nothing to do with the mitigating or aggravating circumstances, it went to Mr. Brown's innocence or guilt. That has long been settled. You all settled that. You settled it.

One other reason I'd like to point out to you why we contend that this man's life should not be taken, as I told you, I have no quarrel with your decision. You did what you were supposed to do. You listened to the evidence, you search your conscience, and you found this man guilty beyond a reasonable doubt, but if this man is sentenced to death and he dies and a mistake has been made, it cannot be corrected. You may say you just finished telling us that you don't think we made a mistake. [I don't think you made a mistake. I think you did what you were supposed to do,] but there were many other human beings involved in this case, including Jim Griffin. I may have made a mistake. Douglas Gill may have made a mistake. Jim Van Camp may have made a mistake. Someone else involved in this case may have made a mistake. If I made a mistake and I failed to do something that I should have done, or I done something that I shouldn't have done, and it caused the evidence to come out in the wrong way, or we failed to get some evidence here that we were supposed to get, or if anyone made a mistake

in this case, I'm not talking about you, ladies and gentlemen of the jury, because all you all can do is to sit there, hear the evidence as it comes from the witness stand, and the law as it comes from the Bench, but keep in mind that this started August 25. Since August 25 how many people have been involved in this investigation and in this trial? Literally hundreds. There have been literally thousands of human decisions made in this case before it got to this courtroom. And I am not God, and no other man who worked on this case is God. And if I, Jim Griffin, made a mistake, Jim Van Camp or Douglas Gill made a mistake, and we didn't see that the proper evidence came from that stand, a mistake could have been made. Not by you, but by us. And if a mistake has been made and this man's life is taken and 5 years from now or 10 years from now or 20 years from now some man on his deathbed says, "I done it, David Brown didn't do it," we can't wash the blood of this man off our hands. That to me, that to me is the most compelling reason not to take David Brown's life. I accept part of that responsibility. I did the best I could. I'm still doing the best I can, but I'm not God, and no man who worked on this case is God, and to me only God can give life. Only God can give it. Humans can't. And if God had judged this case and if God had gathered all of the evidence, and if God had prosecuted, and if God had defended, [then I would say there have been no mistakes and let God take his life, but that to me is the]

most compelling reason.]

In addition, like I say, remember, [thirty-two years without trouble; thirty-two years without violating the law; thirty-two years without an act of violence.] And I want you to know that taking this man's death is not going to bring back Diane or Christie Chalfinch.

I'd like to bring forward one other thing. Mr. Lowder said send a message loud and clear. If you violate the law, you suffer the death penalty. [Do you think that had that message been sent David Brown, do you think that that would have prevented these killings? You know it wouldn't. When he did that, he wasn't thinking, in the sense of the word that he had fear or he had sympathy. That was an act of a man driven,] that does not excuse it, but sending a message loud and clear will not prevent this kind of thing. It might prevent a man from thinking, planning a killing or it might prevent a man who would sit coldly and say I'm going to rob a store and then kill someone in the process, but it wouldn't prevent this kind of thing.

Ladies and gentlemen, I'm going to soon quit. I'm not asking you, I'm begging you, I'm pleading with you don't take this man's life. If we made a mistake, if I made a mistake if someone else has made a mistake and his life is taken, it can't be corrected. Taking his life isn't going to bring back Diane and Christie Chalfinch. I say to you that taking his

life is not going to send the message to prevent this kind of thing from happening again. [I say to you that David Brown has lived prior to this time or before this time for thirty-two years without an act of violence, without a threat of violence. I say to you that it was out of character for the man.] I say to you that under the law he is entitled to live, under the law which Mr. Lowder has talked about passed by the Legislature. I say to you under---you want to go to the Biblical law, the moral law, I want you to remember and I ask you to have some compassion in your heart, and as I said before, you're coming up to the Christmas Holidays when we are going to celebrate the birth of Jesus Christ. I ask you to consider the law first, consider that under the law he had many mitigating circumstances, but above all else, I want you to remember when Christ had been nailed upon the cross, a horrible death, suffering a horrible death, he looked up to the sky and he said, "Father, forgive them for they know not what they do." I ask you to have just enough of that spirit not to let this man go, but to spare his life and to put him in the State's Prison for the remainder of his natural life. I ask you to remember that. Mr. Lowder has asked you to recall your days on a farm and to be resolute. I ask you to be resolute also. may take more courage to spare this man's life than it does to take it.

I ask you to consider all, we're talking about a man's

life.

I say one last thing in closing, and then I'll quit. Under our system we have an adversary system of law. You heard this case fought hard as I can fight it. You have heard Mr. Lowder fight it as hard as he could fight it. That is the way it should be. The defense is not vigorous nor the prosecut is not vigorous an innocent man be convicted or an innocent man will go free. This thing has been fought for two weeks as hard as we knew how to fight it. I make no apology for it, but I want you to remember despite the vigor with which the prosecuti has fought it, there has not come from that stand the first piece of evidence that this man, David Brown, ever transgressed the law before today. He never committed a violent act before that August 25. I ask you to remember all of that and when you answer these issues, to write in "life imprisonment", not "death", because if the word "death" is written in there, this man dies and whether it be me or someone else involved in the case, if a mistake was made, it can't be undone.

I thank you sincerely for the time, the attention tha you have given this case. I know it's been an imposition upon you. We all want to go home for Christmas. And I know what the sacrifice has meant, but I want you to know I appreciate your not being here just in body, but the attention you have given. I ask you to take your time and remember that we are not talking about some minor matter. We are talking about a

living human being, a man created in the image of God, and I ask you to spare that man's life and write in on the back page "life imprisonment", not "death", because if a mistake is made, it can be corrected if it is life imprisonment.

Q When he was growing up?
A Yes, sir.
Q You believe in capital punishment, too, don't you, Mrs. Rummage?
A I sure do.
Q Have all your life?
A All my life.
Q You don't know of anything that would prevent you from giving to the State of North Carolina a completely fair trial, do you?
A No, sir.
Q Thank you, Mrs. Rummage. Mr. Rape, that is a Union County name, you are from this county, aren't you?
A Yes, sir.
Q Lived here all your life?
A Yes, sir.
Q You're married, Mr. Rape?
A Yes, sir.
Q Have children?
A 3.
Q And what is your work, Mr. Rape?
A General Telephone Company.
Q Mr. Rape, I didn't see all the hands that went up back here, but I believe a number---well, I know a number raised their hands saying they had served on the jury before. Have you?

Q Many years?
A Yes, sir, all his life mostly.
Q You believe in capital punishment and all your life?
A Yes, sir.
Q No question in your mind about it?
A No, sir.
Q And as you face your responsibilities as a trial juror, you don't do so with any temerity or apprehension at all, do you?
A No, sir.
Q That is, you are not bothered with your role as a trial juror if you are one of the twelve, are you?
A No, sir.
Q It is Mrs. Borchers? I may be mispronouncing it.
A That's correct.
Q Borchers?
A Yes.
Q Mrs. Borchers, are you a native of this county?
A Yes, I am.
Q And what section of the general are do you live, please?
A West of Monroe, inside the city limits.
Q In the country?
A Inside the city limits.
Q I see. And I would ask you if you were born in that section of the county?

JUROR. BORCHERS

A No, I was born out in the Houston section.
Q And may I go back to Mrs. King, Mrs. King, as you grew up there in the Waxhaw area, did you have occasion to work some there on the farm at all?
A Yes, I worked on the farm. We didn't live with our father. My mother was dead and my uncle raised us and he was a farmer.
Q Thank you. Now, Mrs. Borchers, I'm going to ask you this, you say you grew up in the Houston section, that used to be farming country, I don't know, may be different now, some areas, do you know what farm life is?
A Yes, sir.
Q How many brothers and sisters did you have?
A I have 12 brothers and sisters.
Q It is fair to say you know what hard work on the farm is?
A I certainly do.
Q And I would ask you if you believe in capital punishment in some cases?
A I do.
Q No question in your mind about it?
A Right.
Q And have you had that view all of your adult life?
A I have.
Q Do you presently work outside the home?
A I am retired.

JUROR STARNES

A He works for Boyce Helms.
Q You have children?
A Yes, sir.
Q How many, please?
A 2.
Q Boys or girls?
A Have one boy and one girl.
Q How old is the little girl?
A She's 3.
Q Mrs. Starnes, if you don't mind saying, talk a little bit louder, don't mind talking like you might be home talking to somebody out in the yard, I want to know if you believe in capital punishment and know your mind about that?
A Yes, sir, I believe in it.
Q You are quite positive?
A I'm sure.
Q Mrs. Starnes, knowing that name, is he from this county?
A He's lived in the county all his life.
Q Where did he grow up, the general area, please?
A Roughedge.
Q Mrs. Starnes, do you understand that in this case or I'll inform all the jurors, that in this case the State will introduce evidance from pathologists, experts who examined the bodies of the alleged victims and in a very graphic and detail manner. He will describe many, many wounds in each of the

JUROR WEATHERLY

Q I don't want to insult your intelligence by asking you some of these questions, but out of precaution we sometimes ask questions that may offend a juror, but we don't intend to, you understand. I'll ask this of you and should be addressed to all jurors, do you understand that what Mr. Griffin personally thinks about this case, what Mr. Van Camp personally thinks about these cases, and what Mr. Gill personal thinks about these cases, and for that matter, what any of my staff or even what I think about these cases, that what we think about it has got nothing to do and should have nothing to do with the guilt, your findings as to the guilt or innocenc of this defendant. You understand that, don't you?

A Right.

Q If any of the lawyers in this case expresses any opinion about it, including me, you will not accept that as evidence, knowing that it is not evidence, but will be solely governed by what you hear from the witness stand and the trial Judge?

A That's right.

Q And so just because somebody in the case happens to be a person you have spoken to, certainly would not affect your verdict?

A No, sir.

Q Mrs. Weatherly, do you believe in capital punishment?

A Yes.

Q You're quite positive about that?

WEATHERLY CONTINUED

A I am sure.

Q Absolutely sure?

A Yes.

Q Mrs. Weatherly, do you have children?

A 3.

Q What are their ages?

A 25, 20 and 23.

Q You have grandchildren?

A No.

Q Is it Sossamon?

A Sossamon.

Q Mr. Sossamon, are you a native of this county?

A Yes, sir.

Q In what area of the county were you born?

A Indian Trail.

Q Have you lived---do you live there now?

A Yes, sir.

Q Lived there all your life?

A All but 3 years in Mecklenburg County.

Q Where?

A I lived in Mecklenburg County for 3 years, been about 8 years ago.

Q Have you ever been in Service?

A The Army Reserve.

Q What is your work, Mr. Sossamon?

JUROR SMITH

Q Do you believe in capital punishment in some cases?
A Yes, sir, I do.
Q Have you ever believed otherwise?
A I suppose as---when I was much younger, I probably did. I have given a lot of thought, but I do believe in capital punishment, certain consideration.
Q If the evidence and the law requires it, your consideration of that, I should put it, if under the evidence and the law it becomes your duty to seriously give consideration to returning with a decision that means the defendant will be sentenced to death, can you seriously and conscientiously do that if the evidence and law so warrants?
A Yes, sir.
COURT: You mean consider it? You mean can she consider that, the death penalty?
MR. LOWER: Excuse me, Your Honor, I may have used the wrong terminology. I'll rephrase it.
Q Well, if the evidence and the law warrants your considera of it, do you know of any circumstances in which case where you could do it?
A Where I could or could not, I'm sorry, I don't understand
Q I'm talkin about you could do it if you saw fit?
A I could do it, yes, sir.
Q We got to be careful, as His Honor talk you, the record being taken, and that is for no idle reason, I suggest to you.

JUROR BROOME

Q You have no children?
A No, sir.
Q You have nieces and nephews?
A Yes, I have a good many of those.
Q What is your present work, Mrs. Broome?
A I work with Lance Packing Company in Charlotte.
Q You work for them several years?
A 24.
Q Do you believe in capital punishment?
A Yes, sir.
Q Have you believed in capital punishment all of your adult life?
A Yes, sir.
Q Mrs. Leonard, do you believe in capital punishment?
A Yes, sir.
Q Always have?
A Yes, sir.
Q And do you work outside the home?
A Yes, sir.
Q What is that work, please?
A Guardian Care.
Q If you don't mind saying, specifically what are your duti
I work in the kitchen, dietary part.
Q How long have you worked out there for them?
A Little over a year, about a year.

JUROR LEONARD

Q Are you a native of this county?
A No, sir.
Q Where were you born?
A Catawba County.
Q Was that in the country or in the city?
A In the country.
Q Do you know what farm work is?
A Yes, sir.
Q You have brothers and sisters?
A Yes, sir, 4 brothers and one sister.
Q Do you have children?
A Yes, sir.
Q And do you have grandchildren?
A No, sir.
Q No question in your mind, Mr. Leonard, is there as to whether or not you believe in capital punishment?
A No.
Q No question in your mind at all?
A No, sir.
Q At the outset the State of North Carolina, of course, and the rules and I have no quarrel with them, we have no quarrel with them, passes upon the jury, and of course, when we do so, no evidence has been introduced, and we do not have any knowledge of what, if any, defenses might be used in the respective cases, that being the case, if there should be any

JUROR BYRUM

Q You don't?
A No answer.
Q Mrs. Byrum, I won't ask your age, you are not as old as some of us, to be sure, I would ask you this, are you sure that you believe in capital punishment?
A Yes, sir.
Q Have you ever believed otherwise to the best of your recollection? I should qualify that. Since you have been grown, and that hasn't been so many years, since you were 18, I'll ask you this, 18 years of age, have you believed in capital punishment?
A Yes, sir.
Q No question in your mind about it?
A No, sir.
Q Now, you have had an opportunity to sit back there and think about this for a number, not hours now, but you don't have any qualms or reservations, you are not apprehentive about your role as a trial juror in this case, are you?
A No, sir.
Q And if you are selected as one of the trial jurors in these cases, as old folks used to say, you'd do your dead level best to give to both sides a fair trial, wouldn't you?
A Yes, sir.
Q And you will see to the best of your ability that justice is done whatever justice demands, is that correct?

JUROR LEMMOND

A 2 sisters.
Q Do you have any nieces and nephews?
A Yes, sir.
Q Do they reside in this county?
A Yes.
Q Some of them?
A Yes.
Q Mr. Lemmond, do you believe in capital punishment?
A Yes, I do.
Q Have you believed in capital punishment all of you adult life?
A Yes.
Q You're quite positive about it?
A Yes.
Q Do you know the defendant in this case, Mr. Brown?
A No, sir, I don't.
Q Do you know either of the counsel, Mr. Gill, Mr. Van Camp, or Mr. Griffin?
A No, sir.
Q You have heard of Mr. Griffin, I take it?
A I have heard of him.
Q But you don't know him personally?
A No, sir.
Q Mr. Lemmond, did you grow up in the town or out in the country?

JUROR LITTLE

A I knew him.
Q Not kin to him either?
A Not kin to him either.
Q On your views about capital punishment, Mr. Little, there is no doubt in your mind about whether you believe in it or not, is there?
A I believe in it, yes.
Q All of your adult life?
A Yes.
Q You're quite positive about that?
A YEs, sir.
Q Mr. Little, if we prove to you by competent evidence and beyond a reasonable doubt that this is indeed the exceptional cases as some jurors might refer to it, the exceptional case in which a defendant should under all the circumstances and under all the law and under the evidence, as I say, under all the instructions of the court and after weighing all the circumstances you find this to be the exceptional case giving rise to serious consideration of returning with a decision that meant that the Judge would be required to sentence this defendant to death, if you find it to be that case, you would give it that careful consideration?
A Yes, sir.
Q No question in your mind about it?
A No, sir.

JUROR CALDWELL

same, couldn't you, Mr. Little?
A Yes, sir.
Q Mr. Caldwell, how you feel about capital punishment, are you for it or against it?
A I am for it.
Q I didn't understand you.
A I said I'm for it.
Q How long have you been in favor of capital punishment in some cases, Mr. Caldwell?
A All my life, every time I hear tale of something like that, about all my life, I guess.
Q That's what I wanted to hear, Mr. Caldwell.
OBJECTION by Mr. Van Camp.
A I was born in Great Falls, South Carolina.
COURT: Wait just a minute.
MR. GRIFFIN: We would object to his statement, "That's what he wanted to hear".
COURT: Don't comment on what you like to hear and don't like to hear, Mr. Solicitor.
Q Mr. Caldwell, were you reared on a farm?
A Yes, sir.
Q Know what hard work is?
A Yes.
Q Have you ever served on a jury before?
A Yes, sir, one time.

JUROR HOLLINGSWORTH

Q None of the parties?
A No.
Q None of the witnesses?
A No.
Q You're quite certain you believe in capital punishment and have all your life?
A YEs, sir.
Q Mrs. Daniels, you have answered that question in the affirmative also. It is the law of the state the jury can not permit any sympathy or bias or prejudice to effect their verdict at all. You wouldn't allow any sympathy for the defendant or those about him to effect your verdict, would you, Ma'am?
A No, sir.
Q And you, Mrs. Daniels, would not do so either, would you?
A No, sir.
Q Mr. Little, have you ever served on a jury before?
A No, sir.
Q I ask you, Mrs. Daniels, Mr. Little and Mrs. Hollingsworth if you know of any reason why you can not give serious consideration to all aspects of this case and if so instructed by the court give serious consideration to all of the circumstances and carefully consider the matter of the death penalty or capital punishment, if, as I say, you are instructed upon this. You can do that, can't you, Mrs. Daniels?

JUROR LAUFFLER

A Yes, sir.
Q How many?
A I have 2.
Q Girls or boys?
A Both girls.
Q How old are they?
A One is 12 and one is 3.
Q Ever do any farm work as you grew up?
A Yes, sir.
Q Know what hard work is?
A I sure do.
Q You believe in capital punishment and have all your life, too, don't you?
A Yes, I do.
Q You don't have any qualms about it?
A No.
Q Mrs. Honeycutt, do you believe in capital punishment?
A Not really.
Q Well, you have problems with the question?
A Moral, yes, sir.
Q Well, I don't know how to phrase it, some folks ask it in different ways, do you really believe in capital punishment or not, if you can answer that question?
A I'm not sure that I really believe in capital punishment.
Q Do you understand it is important that we have a jury tha

JUROR RUSHING

A No, sir.

MR. LOWDER: The State will excuse with our thanks Mrs. Honeycutt.

COURT: Draw another juror.

CLERK OF SUPERIOR COURT: Mrs. Peggy Rushing.

Q Mrs. Rushing, you have heard all that we have said about this case?
A Yes, sir.
Q I will get right to the point, Mrs. Rushing. Do you belie in capital punishment in some cases?
A Yes, I do.
Q You say you do?
A I do.
Q And there is no uncertainty---that is, you are quite certain about it?
A Yes, I am.
Q You know nothing of the defendant, do you?
A No, sir.
Q You don't know any of the lawyers, perhaps you know Mr. Griffin, do you know Mr. Griffin?
A I know Mr. Griffin.
Q Has he ever done any legal work for you?
A Not for me, but for my daughter.
Q How long ago was that?
A Couple months ago.

JUROR STEGALL

Q You believe in capital punishment, don't you?
A Yes, sir.
Q All of your life?
A Yes, sir.
Q You have children?
A Yes, sir.
Q How many?
A 2.
Q What are their ages?
A 16 and 13.
Q Boys or girls?
A Girls.
Q You don't know of any reason why you can't give to the State as well as this defendant a fair trial?
A No, sir.
Q The fact that the matter of capital punishment has been mentioned and will continue to be mentioned, and we contend ultimately will be for your consideration, this doesn't bother you either, does it?
A No, sir.
Q Mrs. Pope, are you a native of this county?
A No, sir.
Q Where were you born?
A Chesterfield County.
Q And you have lived here for many years?

A 5.

JUROR POPE

Q You know what hard work is, too, don't you?
A Yes, sir.
Q Mrs. Pope, do you know your mind to the extent of saying whether or not you believe in capital punishment?
A I do.
Q You do?
A I do.
Q You do know your mind?
A Yes, sir.
Q Have all of your adult life?
A Yes, sir.
Q Don't know a thing about the defendant or any of the circumstances in this case?
A No, sir.
Q And if ultimately you are called upon after a proper instruction by the Judge to carefully consider what should happen to, to determine whether life or death, that wouldn't bother you unduly, will it?
A No, sir.

MR. LONDER: The State is content with this jury.

SELECTION OF JURY BY DEFENDANT: (Mr. Griffin):

Q My remarks will be addressed to Mrs. Ward, Mrs. Stegall and Mrs. Pope alone. I want you to understand the defense contends that although there's been a lot of discussion

JUROR HASTY

A Indian Trail.
Q Is that in the town?
A No, sir.
Q You reared on a farm?
A Yes, sir.
A You ever do any farm work?
A Yes, when I was small.
Q When you were small?
A Younger.
A Do you believe in capital punishment?
A Yes.
Q You know your mind about it?
A Yes, sir.
Q Have for a long time?
A Yes.
Q You have any children?
A Yes.
Q Grandchildren?
A 2.
Q Girls or boys?
A Boy 3 and a girl 5 months.
Q How many brothers and sisters do you have?
A One brother and 3 sisters.
Q You have a number of nieces and nephews?
A Yes.

HASTY CONTINUED

Q Do you work at any public work presently?
A Kenneth Home Fashions, Matthews.
Q How long have---I won't say that. Mr. Hasty, his work, please.
A Used car dealer.
Q Mrs. Hasty, after hearing all the evidence in this case and hearing the arguments and then the instructions of the Judge, and if ultimately you are called upon to determine whether the defendant be sentenced to life imprisonment or death, you do not approach that thought with any trepidation or fear, do you, that is, you are not fearful of your role if that comes to be?
A Well, I think it is my duty.
Q You understand it would be your duty?
A Yes.
Q Under the law and under your oath?
A Yes.
Q It is not something that I simply suggest anyone here alone simply suggests, you understand under the law of the great state of North Carolina that the State can't get a fair trial unless you do feel that way?
A Yes, sir.
Q So you know as you sit there now that you can and will give to the State of North Carolina a fair trial, do you?
A Yes.

JUROR INNIS

Q Do you still do some of that work?
A Well, I'm supervisor now, I'm in charge of 8 markets.
Q Know what a lot of hard work is, don't you?
A Yes, sir.
Q Do you believe in capital punishment?
A Yes, sir.
Q The occupation of your father, what was his occupation?
A Textile.
Q Work for Cannon Mills, where did he work?
A Concord.
Q That was Cannon Mill?
A Yes.
Q How many brothers and sisters do you have?
A One sister.
Q I'm going to repeat a question because I asked it at the outset, but I want to make absolutely sure,you don't know a thing about Mr. Griffin, do you?
A No, sir.
Q Have you ever served on a jury up in Cabarrus County?
A No, sir.
Q Here?
A No, sir.
Q Now, Mr. Innis, each and every person, at least each of us, think we know our minds. You are positive you know your mind and have for many years to the extent that you fully believe in capital punishment?

JUROR ROSS

Q Repeat that one more time.
A Machine shop and farming.
Q And have you ever served on a jury before?
A Yes, at the old courthouse I believe about 1972.
Q '72?
A Yes.
Q Was that criminal session of court?
A Yes, it was.
Q Did you actually serve on a jury?
A I sat in on a case but the defendant changed his plea, so didn't have to make a decision.
Q That tests my recollection, perhaps yours, was I prosecuti
A Yes, you were.
Q I approved you as a juror at that time?
A Yes.
Q You say you believe in capital punishment?
A Yes, I do.
Q Since yesterday, if you needed to, you certainly had time to think about it, haven't you?
A Yes, sir.
Q Well, have you had to think about it a lot to come---
A No, sir.
Q Already knew your mind?
A Yes, sir.
Q Believed in it all your life?

JUROR SMITH

A Yes.
Q She live in Georgia?
A Yes.
Q Do you believe in capital punishment?
A Yes, sir.
Q No question in your mind about it?
A None whatsoever.
Q How long have you lived in Union County?
A 6 and a half years.
Q Prior to that where were you living?
A Middletown, Connecticut.
Q South Carolina?
A Middletown, Connecticut.
Q What were you doing up there, that is, what work?
A I was general sales manager of an architectural hardware manufacturing corporation.
Q Have you traveled a number of states?
A 40, yes, sir.
Q Have you spent as much time in Union County as anywhere else?
A I must say, in my married life I have lived in Union County longer than any other one location, yes.
Q I'll ask you this, since you put it that way, do you have any intention or plans to leave Union County in the not too distant future?

SMITH CONTINUED

A No.
Q Have you attended any schools or colleges beyond the high school level?
A Yes.
Q What schools or colleges?
A Piedmont College, Peoria, Ohio.
Q What was your major?
A I don't have a degree.
Q Believing in capital punishment, as you say you do now, have you ever held a different view?
A No.
Q Quite positive of that?
A Positive.
Q Mr. Steele, are you from this county?
A Yes, sir.
Q Where do you live in the county?
A In the Waxhaw area.
Q Have you lived there most of your life?
A All my life.
Q Are you married?
A Yes, sir.
Q You have children?
A Yes, sir, I have one boy.
Q Is your wife from this county?
A Yes, sir.

JUROR GOODSON

Q Mrs. Goodson, are you from this county originally?
A No, I was born in Catawba County.
Q Where in South Carolina?
A Catawba County, North Carolina.
Q I see. And was that in the city or in the country?
A In the city, town, rather.
Q Well, I'll get right to the main question at this point. You believe in capital punishment?
A Yes, sir, I do.
Q You're positive of it?
A Yes.
Q Have all your life?
A All of my adult life, yes.
Q That's what I'm asking about, yes. It is Mrs. Goodson?
A Right.
Q You have children?
A 4 boys.
Q Do you have brothers and sisters?
A Yes, I have 3 brothers and 2 sisters.
Q You have any nieces and nephews?
A Yes.
Q Both?
A Yes, quite a few.
Q Some of them quite young?
A Yes.

JUROR SIMPSON

Q You have grandchildren?
A Yes, sir, 2.
Q How many?
A 2.
Q Boys or girls?
A Boys.
Q Do you have brothers and sisters?
A Yes, sir.
Q How many?
A 2 brothers and one sister.
Q You have a number of nieces and nephews?
A Yes, sir.
Q Do many of them live in this county?
A All of them.
Q Do you believe in capital punishment?
A Yes, sir.
Q Quite positive about that?
A Yes, sir.
Q Have you believed in capital punishment in some cases all of your adult life?
A Yes, sir.
Q I'll ask you, Mrs. Goodson, have you---you were born in Catawba County, I believe you said?
A Yes.
Q Have you ever lived outside North Carolina for any appreciable period of time?

JUROR HAIGLER

Q Does your father and mother live there?
A Yes, sir.
Q That being a name well-known in the county, your ancestors go back a long way in Union County?
A Yes, sir.
Q Are you married?
A Yes, sir.
Q You have children?
A Yes, sir.
Q How many?
A One.
Q Boy or girl?
A Boy.
Q How old is the boy?
A 4 months.
Q Do you believe in capital punishment?
A Yes, sir.
Q No question in your mind about it?
A No, sir.
Q You're a man of a relatively few years, you have believed in capital punishment for a number of years now, haven't you?
A Yes, sir.
Q And is your wife from this county?
A Yes, sir.
Q What is your present work?

HAIGLER CONTINUED

A I work at Production Control.
Q Do you know anyone connected with this case, including anyone at this table?
A No, sir.
Q I'll ask another question, have you ever seen Mr. James E. Griffin or spoken to him about anything?
A No, sir.
Q Since yesterday you have thought about capital punishment just how much you do believe in it, have you?
A Yes, sir.
Q At least to some extent?
A Yes, sir.
Q Has it caused you any problems since yesterday, that is, have you had to turn this matter over in your mind since yesterday in order to know your mind or did you know it yesterday?
A I knew it yesterday.
Q And if you are ultimately called upon to render a verdict in this case, you can do so without trepidation or without fear or apprehension?
A Yes, sir.
Q Do what you think is right under all the circumstances and under all the rules and evidence and law as outlined by this court?
A Yes, sir.

HAIGLER CONTINUED

Q Give to the State of North Carolina that we represent the same fair and impartial trial also you'll give to this defendant?

A Yes, sir.

Q And if you deem appropriate under all of the instructions, under all of the law after you made certain findings in accordance with the instructions, if you deemed it appropriate in following those instructions, you could with resolution return to this courtroom such a decision that would mean the defendant would be sentenced to death, is that correct?

A Yes, sir.

Q Now, Mr. Baucom, have you had occasion to think about the death penalty, your thoughts on it since yesterday?

A Yes, sir.

Q Did you know your mind as of yesterday about that?

A Yes, sir.

Q No question about it yesterday and none today?

A No.

Q You know anyone connected with the case?

A No answer.

Q You don't, do you?

A No.

Q You don't know the defendant, the lawyers?

A Mr. Griffin, I know his reputation, but that's all. I have never spoken to him.

JUROR HELMS

in these cases, first, that under the evidence and under the law which you will hear if you are one of the jurors, either one of the 12 who renders a verdict, or an alternate, we are not only asking for a verdict of guilty of murder in the first degree, which we say the evidence and the law will certainly support and prove beyond a reasonable doubt that he is guilty of 2 counts of murder in the first degree, we say that a time will come, and that is why we are permitted to ask many questions of each of you about your thoughts about about capital punishment, we in representing the State say the time will come when that determination will be made by this jury, so knowing your role, I ask first as we ask individual questions of you first about your background, perhaps, that you turn over in your minds, each of you, and those prospective jurors, as they think about this view on capital punishment, and we want to know if you do in fact believe in capital punishment, not wavering, we want to know at the outset, that is, when we approve you as a juror, if we do, that you surely do believe in capital punishment in some cases, and that you can, if necessary, make a decision that would involve capital punishment. Do each of you understand I take it you do, that the rules which we are talking about, the rules of evidence, the presumption of innocence, the burden of proof which you are going to hear about many times, not only from the lawyers, but you will hear the instructions

JUROR WILLIAMS

the defendant, because the law has to be adhered to. Now, having sat there a few minutes, Mrs. Helms, I want to ask you this first, have you ever served on a jury before?

A No, sir.

Q Have you, Mr. Williams?

A No, sir.

Q First of all we are here to see both sides get a fair trial. We contend the only way the State of North Carolina can get a fair trial in these cases is for each juror to be able to seriously consider the death penalty, if youcome to that point, we say you will under the evidence and the law. We say if you are going to be fair to the State, you have got under your oath give serious consideration to the death penalty. We are entitled under the law to have you do so if you make that determination. Do you understand that, Mrs. Helms?

A Yes, sir.

Q And you, Mr. Williams?

A Yes, sir.

Q And do you understand that this rule that we are talking about, about the capital punishment issue, this is something passed by the Legislature of the State of North Carolina, your representatives, do you understand that, Mrs. Helms?

A Yes, sir.

Q And you, Mr. Williams?

A Yes, sir.

JUROR HELMS

Q Now, Mrs. Helms, do you believe in capital punishment in some cases?

A Yes, sir.

Q Have you held a different view, that is, have you in your lifetime been against capital punishment?

A No, sir.

Q Well, then it is fair to say as long as you can recall you have believed in it?

A Yes, sir.

Q No question in your mind about it?

A No, sir.

Q Now, I'm not suggesting and would not suggest,Mrs. Helms, that it is necessarily comfortable position that you are in as you sit here today, and I am not trying to be overly dramatic about it, it is a most important case as far as criminal cases go, as Mr. Griffin indicated yesterday. There can't be a more important case in our state. Do you understand that, Mrs. Helms?

A Yes, sir.

Q Mrs. Helms, are you a native of this county?

A Yes, sir.

Q In what section of the county were you born? Don't give me your address, I want to know in what area of the county you were born.

A Well, I wasn't born in Union County, I was born in Paw Creek, in Mecklenburg.

JUROR WILLIAMS

A Yes, sir, they did.
Q Mr. Williams, are you a native of this county?
A Yes, sir.
Q Lived here all your life?
A Except for about 3 years in Catawba County.
Q In what section of the county were you born, don't give me an address, I just want to know the general area?
A Southern, Buford Township.
Q Were you reared on a farm?
A Yes, sir.
Q Do you know what farm work is?
A Yes, sir.
Q Do you believe in capital punishment in some cases?
A If there is positive evidence.
Q Yes, we have got the burden of proof. We have no quarrel with that. We say we are confident we are going to prove to you beyond a reasonable doubt that this man is guilty of murder in the first degree, Mr. Williams. We recognize we have to prove that to you first, and that is the way it should be, that is what you're talking about, isn't it?
A Yes.
Q My question is this, Mr. Williams, if we do prove to you that this defendant is guilty beyond a reasonable doubt of murder in the first degree in 2 cases, could you conscientiously and seriously then consider whether he be sentenced to death

WILLIAMS CONTINUED

or receive life imprisonment under the instructions of the Presiding Judge?
A Yes, sir.
Q And under some circumstances you would have the strength and fortitude to return to this courtroom with a decision that the defendant would be put to death if you deem it appropriate under the instructions of the Presiding Judge, is that correct?
A Yes.
Q You don't have any doubt about that?
A No, sir.
Q Mr. Williams, are you married?
A Yes, sir.
Q You have children?
A One.
Q Do you have grandchildren?
A One.
Q Is that a boy or girl?
A Girl.
Q How old is your grandson, if you don't mind saying?
A Granddaughter, she is 10 months old.
Q You have brothers and sisters?
A One brother.
Q You have any nieces and nephews?
A No, sir.
Q Do you have any other relatives in the county?

JUROR BEAVER

indicate age, but young lady, you wouldn't mind telling me when you graduated, would you?

A 1967.

Q And what is your present work, if you work outside the home?

o I work part-time as a secretary and part-time as a florist

Q As a secretary, for whom do you work?

A Monroe Motor Company.

Q How long have you worked out there?

A 3 months.

Q And Mr. Beaver, what is his work?

A He is in data processing at a bank in Charlotte.

Q Is he from this county?

A Yes, sir.

Q Where was he born and reared?

A In the same area.

Q Did you attend school beyond the high school level?

A No, sir.

Q You have children?

A Yes, one.

Q A boy or girl?

A It's a girl, she's 10.

Q Mrs. Beaver, having sat here for some several minutes in this courtroom today, you know what we are here for?

A Yes.

Q Having thoughts about capital punishment, at least I

BEAVER CONTINUED

would assume here today and no doubt having thought about it in the past, do you know your mind about that question?

A I'm afraid I don't.

Q Afraid you don't?

A No.

MR. LOWDER: The State will excuse Mrs. Beaver with our thanks.

COURT: Call another juror.

CLERK OF SUPERIOR COURT: Billy Frank Watkins. You do solemnly swear that you will truthfully and without prejudic or partiality try all issues in criminal actions that come before you and give true verdicts according to the evidence, so help you, God.

SELECTION OF ALTERNATE BY STATE: (Mr. Lowder):

Q Mr. Watkins, you have heard all that we have said includir what the Presiding Judge said, you have understood us all here today?

A Yes, sir.

Q Mr.Watkins, are you a native of this county?

A Yes, sir.

Q Where were you born and reared in this county, what section, I'm not asking the address.

A Bakers or Wesley Chapel area.

Q How many miles out of Monroe?

A 6.

JUROR WATKINS

Q Your father was a farmer?
A Yes, sir.
Q Did he have some trade where he worked off the farm, so to speak, like carpentry or mechanic or something?
A No, sir.
Q Farmed mostly?
A Yes, sir.
Q Mr. Watkins, if we prove to you, as we contend we will, that the defendant is guilty of murder in the first degree in 2 cases, invonving a young woman, one of the alleged victims a young woman about 26 years of age, the other alleged victim was her daughter 9 years old, we contend they were murdered in their own apartment there in Pinehurst. That is what the evidence will show, and we contend the evidence will show this defendant is the man who did the killing, that he is the murderer. If we prove that to you beyond a reasonable doubt that he is guilty of murder in the first degree, will you have any problem in returning with a verdict of guilty of murder in the first degree?
A No, sir.
Q If you should return with a verdict of guilty of murder in the first degree of these cases, could you thereafter seriously give consideration to returning to this courtroom with a decision that would mean this defendant would be senten to death all in compliance, that is, following the instruction

WATKINS CONTINUED

of the court at all times, could you do that?
A Yes, sir.
Q I'm not asking what you will do, I'm asking if you could do it, if you thought under all the circumstances and under the law and under the appropriate instructions that that should be done, you could do it?
A Yes, sir.
Q Well, as you sit there now, you don't face your responsibility with any misgivings or apprehension, do you?
A No, sir.
Q That is, you aren't fearful of your role nor timid about it, if you are, I want to know it?
A No, sir.
Q Do you feel uncomfortable in being in this position right now, I'm not asking if you want to be here, are you unduly concerned about the matter due to what might be done in the case?
A No, sir.
Q Well, I think sometimes folks being asked questions lik this, they feel at the outset no way such a case could be presented to him. We contend this is that exceptional case. Do you understand that?
A Yes, sir.
Q We contend, as Mr. Griffin has indicated, this is the extraordinary case, this case, and we're going to prove that

WATKINS CONTINUED

to you. We're going to prove, we contend, this is the man who committed the acts alleged. And Mr. Watkins, I know some folks just don't like to come to the courthouse and certainly don't like to be asked personal questions, and I understand that. Some folks are right independent. They are entitled to be oftentimes, but here we don't control the rules. The law does. And counsel has a right. We have no quarrel with it. Counsel has a right to ask personal questions about what you watch, what you do, where you go, and sort of your habits. That's the rule. We don't make them, but even though you may not want to be here, we want to know if you could under some circumstances---strike that, make a decision that would mean the defendant, a particular defendant would be sentenced to death. You could under some circumstances do that, is that what you are saying?

A Yes, sir.

Q You're quite sure of that?

A Yes, sir.

Q And you believed in capital punishment all your life?

A Yes, sir.

Q You're sure of that?

A Yes.

Q You hesitated a little. I want to know, I'm not trying to pick on you, Mr. Watkins. We want to know if you are absolutely sure of it, are you?

Juror's Name	Reservations about Death Penalty	Excused by District Attorney
Mrs. Griffin	Yes	Yes
Mrs. Leonard	no	---
Mrs. Smith	Yes	Yes
Mrs. Broome	no	---
Mrs. Weatherly	no	---
Mrs. Rummage	no	---
Mr. Rape	no	---
Miss King	no	---
Mrs. Borchers	no	---
Mrs. Starnes	no	---
Mr. Sossamon	no	---
Mr. Caudle	Yes	Yes
Mrs. Byrum	no	---
Mr. Larry McCarver	no	---
Mrs. F.W. Bovey	no	Yes
Mr. Lemmond	no	---
Mr. F.A. Green	no	---
Mrs. Maggie Watts	Yes	Yes
Mr. Walter Caldwell	no	Yes
Mrs. Brenda Daniels	no	---
Mr. Little	no	---
Mrs. Hollingsworth	no	---
Mrs. Harold W. Carter	Yes	Yes
Miss Martha Autry	Yes	Yes
Mrs. B.M. Boneycutt	Yes	Yes
Ms. Joyce Lauffler	no	---
Mrs. Rushing	no	---
Ms. Patricia Stegall	no	---
Mrs. Ward	no	---
Mrs. Pope	no	---
Mrs. Hasty	no	---
Mr. Earl Innis	no	---
Mrs. Billy Parks Manus	Yes	Yes
Mr. Rose	no	---
Mr. Richard O. Smith	no	Yes
Mr. Ronnie Alexander Steele	no	Yes
Mrs. Kay Goodson	no	---
Mrs. Martha Simpson	no	---
Mr. Ronnie Haigler	no	---
Mr. Donald Baucom	no	---
Mrs. Helms	no	---
Mr. Williams	no	---
Mrs. Linda Beaver	Yes	Yes
Mr. Watkins	no	---

of the Ten Commandments, which we have here in the old Bible about 1847, this Bible, and I turn to a place of Exodus in which a place where the Lord spoke through Moses and gave us the Ten Commandments. It is in Chapter 20 of Exodus, and I'l just read that particular one. "Thou shalt not kill". That has been translated in more recent Bibles, ["Thou shalt not murder." That is the law that applied to him on and before he killed these two victims. Thou shalt pot kill. He violate the Commandments of God.]

Now, Mr. Griffin will tell you that this is set out in the old Mosaic Law which called for an eye for an eye and a tooth for a tooth, but if he says ignoresome portions of this, surely he wouldn't suggest you ignorethe Commandments of God, the Ten Commandments, but in another section in Chapte 21 of Exodus the Lord still speaking, says this. "He that smit a man, so that he die, shall be surely put to death." And 14, that is, verse 14, Chapter 21, says this. "But if a man come presumpuously upon his neighbour, to slay him with guile; thou shalt take him from mine altar, that he may die." That is just after the Ten Commandments. That doesn't mean under our present law that all persons convicted of murder in the first degree shall suffer death. That was the Lord speaking according to the Bible.

Folks, this is a day that calls for the best in you; calls for as firm a position as you have ever been called upon

have died in vain. Let a message go out from the Union County Courthouse on this the 20th day of December, 1980 to this defendant and all who would act likewise, let it ring loud and clear that people, if you decide you're going to slay peop e any person who wants to slay people in their own home, unprotect ed women and children, that we're going to deal with you as the law permits. Let that message go out, folks. Only you can do it. The officers can't do it. I can't do it. We have no quarrel with the system, but you, you can do it, and it should be done, and it should be done without undue trouble. Take your time, deliberate, think about it. I want you to think when you weigh and consider all of it, put it in the scale and weigh it, and we say you cannot in all good conscience come to another conclusion if you believe in the death penalty, and you said you did. We don't want life imprisonment. [We want the death penalty, folks, and I'm speaking for the people, not for Carroll Lowder. The people. You know what the people think.] Some of you weren't here when this jury was selected the first day. What percentage of the people that you heard talk about it up here believe in capital punishment? 90 percent What do the people want, folks, when you have this evidence and this law? You want your lives to be secure. You want your children and grandchildren to be safe in their home. And if they are going to be safe in their homes, somebody must act. This is the case to act on, folks, not for Carroll Lowder, no,

but for all people. This man, such a depraved, a wicked mind, you certainly can't tell it by looking at him, but that's what is in his mind, nobody will ever figure it out. How do you deal with such a foe? How do you deal with such a foe within society? It's for you to say.

Sometime from now you will think back on what you did, and I say you can think back with resolution and knowing that you did what was right in returning the death penalty, if you believe in the death penalty, we say that that's what you will do.

I thank all of you for your time and attention to us, all of us, my assistants, Mr. Church and Mrs. Shelton, these officers that work long and hard, I thank you for all of them, but it is your system, it is your community, and even though these crimes happened in another county about seventy-five or eighty miles away, people down there are entitled to the same protection as you are and I know you will feel that way, and without more, without saying anymore, folks, on this 20th day of December send out that message, we resolve knowing that you did right, and as you deliberate on this again, when you come to weigh these things that you are going to hear about, think of where the weight is, what really counts in this case, and you know it was atrocious, cruel and vicious manner, 250 p wounds about the bodies in their own apartment. I ask you as seriously and sincerely as I can to return in each case with

I would doubt, I suggest that you rarely use the word heinous or atrocious. Do you know its meaning? I don't know whether you do not not, but I want to read from Webster's unabridged dictionary what it means so you will have full knowledge of what it means, and it reads as follows: "Odious, hateful, atrocious, odious, abominable, contempt, scorn, flagrant," these are synonyms here, "atrocious, infamous, nefarious, wicked. A crime is heinous which is so wicked as to arouse the strongest hatred and revulsion. An offense is fragrant which is glarinly bad or openly evil. A crime is atrocious which is extremely or shockingly wrong, bad, evil, cruel, etc." Everyone of those words fit, folks, fit this man and the way he commited the two cr es. Now, let's go to the next one. Atrocious. These are the words the Legislature used, so I must refer to them and I am entitled to read the book, Webster's. "Atrocious", which comes from the Latin, which is spelled "a-t-r-o-x." It says, "fierce, cruel, extremely brutal or cruel, outrageously wicked, evil, very bad, in bad taste, abominable," the third definition, "very grievous, violent." All the words fit, don't they? Next, cruel. Comes from the French, one is spelled the same way in French, Latin is crudelis, c-r-u-d-e-l-i-s, means raw, unfeeling, disposed to inflict pain and suffering, willing or pleased to torment; vex, or afflict; without pity, compassion, or kindness, fierce; savage; hardhearted. Is there a word that I have mentioned fro

Webster's that you would not apply to the acts of the defendant? Not a one. Those are not my words. Those are the definitions of the crime that words, we say, that are in this case, and you're going to be allowed to find that in question #1, that's an aggravated circumstance. Everyone of the words in Webstar's apply. Next question, "Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against another person?" Well, you know that to be the case. We got more than one crime. Two. Let me read that to you again. "Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against another person?" The answer to that is obvious yes. When he entered the apartment and started killing one of them, it involved the other and he killed the other. Again we don't know which he killed first. In other words we would suggest this to you, in other words you can take these crimes in combination one with the other in determining whether or not that is an aggravated circumstance. To put it a little differently and more explicitly, you can put all the stab wounds together all of them, mix them up, and consider whether all of them added together in effect amount to an aggravated circumstance. Now, those are the two aggravated circumstances in this case, and they outweigh everything else in the case, folks. That is

each one of them before answering Issue One. The State of North Carolina must prove from the evidence beyond a reasonable doubt the existance of any aggravating circumstance and before you may find any aggravating circumstance you must agree unanimously that it has been so proven.

An aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances. Under the evidence in these two cases two possible aggravating circumstances may be considered by you. [And #1, "Was this murder especially heinous, atrocious or cruel?" In this context, members of the jury, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and violent. And cruel means design to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. However, it is not enough that this murder be heinous, atrocious or cruel, as those terms have been defined, this murder and each of these murders, if you so find, must have been especially heinous, atrocious or cruel. And not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which involving it must have exceeded that which is normally]

the trial; it's before the trial.

COURT: I understand.

MR. CUNNINGHAM: Under V, additional claims. I will not argue A, B, C --B, C and F have common issues. B, C and F relate to arguments by the prosecution made during the sentencing hearing that should have been objected to and were improper and should have been raised on appeal; and it was ineffective assistance of counsel not to object and not to raise those on appeal. I won't take time with either of those. They're in the record.

The prosecution argued that the defendant violated the Law of God. There was no objection. There was no issue on that raised. We would contend that's ineffective assistance of counsel. On B -- excuse, me, C, the prosecution argued during sentencing that all people wanted the death sentence in this case. You'll see from the record that that's unsupported. It was not objected to and was not raised on appeal. We contend that was ineffective.

I would like to address myself to F just briefly. During sentencing Mr. Lowder read from the dictionary as to what heinous, atrocious and cruel meant. That's on page --

COURT: I've seen it.

MR. CUNNINGHAM: What Webster's Dictionary says heinous, atrocious and cruel is is not what the law is in North Carolina. It's what the North Carolina Supreme Court says

OPPOSITION BRIEF

ORIGINAL

No. 86-5234

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

DAVID J. BROWN,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

STATE OF NORTH CAROLINA

COUNTY OF UNION

JOAN HERRE BYERS, being sworn, states:

1. I am a Special Deputy Attorney General for the State of North Carolina representing the Respondent, State of North Carolina.

2. On September 26, 1986 I personally placed the original and nine copies of the enclosed Brief In Opposition To Petition For Writ Of Certiorari To The Superior Court Of Union County, North Carolina to the Supreme Court of the United States in an envelope properly addressed to the Clerk of this Court, with first class postage prepaid, and deposited the envelope in a mailbox under the exclusive care and custody of the United States Postal Service with the City of Raleigh, State of North Carolina.

Joan Herre Byers
JOAN Herre Byers

Sworn to before me this
26 day of September, 1986.

Donna R Douglas
Notary Public

My Commission Expires: 12-21-88

40pp

No. 86-5234

IN THE
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v.

STATE OF NORTH CAROLINA,
Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF
UNION COUNTY, NORTH CAROLINA

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. IS IT INEFFECTIVE ASSISTANCE OF COUNSEL FOR A DEFENSE LAWYER DURING THE SENTENCING ARGUMENT, WITHOUT FIRST REQUESTING HIS CLIENT'S PERMISSIO, TO CONCEDE IN THE FACE OF OVERWHELMING EVIDENCE THAT SOME OF THE AGGRAVATING FACTORS EXIST AND THAT HIS CLIENT APPARENTLY COMMITTED THE CRIME AND CONCENTRATE ON SENTENCING BEGGING FOR MERCY FOR HIS CLIENT IN LIGHT OF MITIGATING EVIDENCE AND CHRISTIAN BELIEFS?

2. WHETHER THE PROSECUTION MAY CONTINUE QUESTIONING A POTENTIAL JUROR CONCERNING THE STRENTHOF THAT UROR'S CONVICTIONS ABOUT THE DEATH PENALTY AFTER HAVING DETERMINED THAT POTENTIAL JUROR IS NOT A WITHERSPOON EXCLUDABLE IN ORDER TO DETERMINE WHETHER TO EMPLOY A PEREMPTORY CHALLENGE?

3. WHETHER A STATE'S ARGUMENT WHERE THE PROSECUTOR, WITHOUT OBJECTION, EMPLOYED WEBSTER'S DICTIONARY TO DEFINE THE WORDS "ATROCIOUS", "HEINOUS", AND "CRUEL", WHERE THE PROSECUTOR ARGUED THE PEOPLE WANT THE DEATH PENALTY, AND WHERE THE PROSECUTOR ARGUED THAT THE DEFENDANT VIOLATED GOD'S LAW WAS SO IMPROPER AS TO VIOLATE THE DUE PROCESS CLAUSE?

4. WHETHER THE PETITIONER, BY FAILING TO PUT ON EVIDENCE IN SUPPORT OF HIS DISCRIMINATION CLAIM, IN STATE COURT, CANNOT NOW RAISE THE MCCLESKY DISCRIMINATION CLAIM?

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STATE OF NORTH CAROLINA,

Respondent

BRIEF OF THE RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rules 33, 34 and 46.5 of the Supreme Court Rules, the State of North Carolina responds to the petition of David J. Brown and requests that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

David J. Brown was tried, convicted, and sentenced to death in the Superior Court of Union County. In an opinion reported in State v. Brown, 306 N.C. 151, 293 S.E.2d 569 (1982) the Supreme Court of North Carolina found no prejudicial error as to either of his two convictions or sentences of death. This Court denied certiorari on December 6, 1982. Brown v. North Carolina, 459 U.S. 1080 (1981). The Superior Court of Union County denied Brown's subsequent Motion for Appropriate Relief on March 27, 1985 and is unreported (see Petitioner's Appendix A). The Supreme Court of North Carolina denied certiorari on this issue

on June 3, 1986. See State v. David J. Brown, ___N.C. ____, 345 S.E.2d 393 (1986).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

David J. Brown was convicted of the August 24, 1980 murders of Shelly Diane Chalfinch and her nine year old daughter, Christina S. Calflinch at the December 8, 1980 session of Union County Superior Court. Brown received two death sentences. The facts as brought out during both the guilt and sentencing stages of the trial are well summarized by Justice Carlton in the Supreme Court of North Carolina's opinion affirming the convictions and sentences and will not be reiterated here. See State v. Brown, supra.

After certiorari had been denied by the United States Supreme Court on December 6, 1982, Brown filed a Motion for Appropriate Relief pursuant to N.C.G.S. 15A-1411 et. seq.. An evidentiary hearing took place October 3, 1984. The evidence presented at the evidentiary hearing consisted of the original trial lawyers being called as witnesses and the trial transcript and record on appeal being introduced. Brown himself declined to testify. No other evidence was introduced. Specifically Brown introduced no evidence to support his claim that the death penalty in North Carolina is discriminatorily applied against blacks who are convicted of killing white victims.

Mr. Griffin, one of the defense lawyers, testified that he did not discuss his sentencing argument with Brown prior to making it (Brown, A. 13). On March 27, 1985, the Honorable William Helms, Superior Court Judge Presiding, denied the defendant's Motion for Appropriate Relief, finding specifically that the defendant's claim "V-A" (the white victim issue) had been abandoned, that the prosecutor had used his peremptory

challenges properly, that in the sentencing argument Griffin stated that the committed the crimes and conceded the existence of aggravating factors, and that the prosecutor while arguing to the jury read from the Bible and Webster's dictionary and told the jury the people wanted the death penalty. The Court concluded that no constitutional right of the defendant was violated by the manner in which the State exercised its peremptory challenges, that the concessions in the argument of Mr. Griffin were reasonable, tactical decision, and that the prosecutor's argument was within the scope of allowable argument.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. BROWN WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS LAWYERS' CONCEDING THE PRESENCE OF AN AGGRAVATNG CIRCUMSTANCE AND THAT BROWN WAS GUILTY OF THE OFFENSE.

As the first of his four issues he claims entitle him to a grant of certiorari, Brown claims his lawyer was not acting within the range of competence expected of attorneys in criminal cases when, during the sentencing argument he, in effect, conceded Brown had committed the offenses and also when he conceded the jury would probably find the presence of the aggravating factors. This argument does not merit issuance of this Court's writ. It does not present a federal questions in which State Court of last resort has decided a federal question in a manner in conflict with the Supreme Court. Nor does it present an important issue of federal law which has not been,, but should be, settled by the Supreme Court. Sup. Ct., R. 17. The standards to apply to determine ineffective assistant of counsel have already been conclusively settled by this Court.

"The bench mark for judging ineffectiveness must be whether counsel's conduct so undermined the adversarial process that the trial [-or sentencing hearing -] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 at 687 (1984). The defendant must first show that counsel's performance was deficient; that he committed errors so serious

that he was not functioning as counsel. Then, he must show he was prejudiced by the lawyer's conduct. Strickland, supra. Using this fundamental standard, it is clear that Mr. Griffin's argument shows no ineffectiveness.

In the matter now before the Court, the evidence against the petitioner at guilt stage - abeit circumstantial - was overwhelming. This evidence included a bloody palm print identified as Brown's at the crime scene and Brown's ring, which was found under the edge of Mrs. Chalflinch's liver. Mrs. Chalflinch and her daughter had been horribly mutilated.

Mrs. Chalflinch's body had approximately 100 stab and cut wounds on her body. At least sixteen of these wounds were defensive in nature. In addition to the stab wounds on various portions of her body, a large gaping cut extended down her left leg from buttock to ankle and a V shaped penetratng stab wound in the vaginal and rectal area created a virtual hole in the body. The child's body was also mutilated in her vaginal area and she also had been repeatedly stabbed and slashed. An electrical cord had been wrapped around the child's neck. See State v. Brown, supra.

During the guilt phase argument, Mr. Griffin contended someone else might have done the killings. The jury, nevertheless, found Brown guilty of first degree murder as to both killings.

During the sentencing hearing, the State presented further evidence that Brown had admitted to a cellmate he had murdered two people, one of whom was named Shelley, with a knife and that he did not understand why the police did not give him his ring back. Brown told the cellmate the ring had been found in one of the bodies. In his sentencing argument, Mr. Griffin concentrated on the mitigating factors and religion to beg that Brown's life be spared. In the course of the argument he briefly stated that hefelt the jury would probably find the existence of the two

aggravating factors, that the capital felony was especially heinous, atrocious or cruel (N.C.G.S. 15A-2000(e)(9), and the murder was part of a course of conduct which included the commision by the defendant of other crmes of violence (N.C.G.S. 15A-2000(e)(11). Griffin then stated "but then we come to the issues that count "Brown, A. 22A - 23A, and spent the rest of the argument begging the jury not to find the aggravating factors sufficiently substantial to warrant imposition of the death penalty, and not to find the aggravation outweighed mitigation.

A capital sentencing hearing is like a trial for some purposes, Bullington v. Missouri, 451 U.S. 430 (1980). However, the issue is the proper sentence, not guilt. A sentencing hearing is not a series of mini trials in which one is convicted or acquitted of aggravating factors. Roland v. Arizona, ___ U.S. ___, 106 S.Ct. 1749 (1986). Rather aggravating circumstances are standards to guide the making the choice between the alternate verdicts of death and life imprisonment. Poland v. Arizona, supra. In North Carolina, the existence of aggravating factors does not mandate a death sentence, but is simply one of four factors which must be determined in the weighing and balancing process in which a jury determines the correct sentence. Thus, a concession that the jury would probably find the aggravating factors to exist is not the functional equivalent to pleading a client guilty without that client's consent. See Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981). Considering the evidence of the hideous mutiliation of the mother and daughter as well as the obvious proximity in time and place of their death, admitting these factors probably would be found and then concentrating on the mitigating evidence, and the weighing and balancing questions as set out in N.C.G.S. 15A-2000(b) and (c) was an appropriate strategy.

Certainly considering the evidence there is no reasonable probability that, but for counsel's concession as to aggravation,

the aggravating factors could not have been found by the jury. Under no ineffectiveness is shown by what was, in essence, concession of the aggravating factors. Strickland v. Washington, supra.

Likewise, counsel did not breach a fundamental loyalty to his client by assuming in the sentencing argument that his client was the person who killed the Chalflinches.

A sentencing argument assuming the defendant is guilty of the offenses concedes nothing since the jury had already determined those facts beyond a reasonable doubt. Thus, this portion of the argument also does not violate any prohibition against a lawyer in effect pleading a client guilty without the client's assent.

In this matter, the assumption that Brown committed the murders was necessary to argue effectively that the jury should consider the proffered statutory mitigating factors that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. N.C.G.S. 15A-2000(f)(6). This assumption also was necessary in order to ask the jury for mercy. Obviously then, this was a reasonable tactical decision made by counsel. Even if in the tactics were unreasonable, in view of all the evidence this argument strategy could not possibly have prejudiced Brown. It cannot constitute ineffectiveness. Strickland v. Washington, supra.

Thus, since Griffin's argument was appropriate under the circumstances and did not constitute an error so fundamental that Griffin was not functioning as counsel, there is no reasbn for this Court to issue its writ to review this question.

II. THE PROSECUTOR'S QUESTIONING OF POTENTIAL JURORS AND PEREMPTORILY EXCUSING JURORS WHO, WHILE NOT WITHERSPOON EXCLUDABLES, EXPRESSED RESERVATIONS ABOUT THE DEATH PENALTY IS NOT VIOLATIVE OF THE UNITED STATES CONSTITUTION.

Brown next suggests his constitutional rights pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution were violatd by the prosecutor's further questioning and then peremptorily challenging jurors who were not excluded under Witherspoon v. Illinois, 391 U.S. 510 (1968) but who expressed uncertainty as to their ability to return a death penalty.

This Court, in Batson v. Kentucky, 476 U.S. ____,, 106 S.Ct. 1712, (1986) while reaffirming the principle that peremptory challenges may not be used in a racially discriminatory fashion, nevertheless held: "...A prosecutor ordinarily is entitled to exercise peremptory challenges 'for any reason at all, so long as that reason is related to his view concerning the outcome' of the case to be tried" so long as the juror is not excused solely on account of the juror's race or on the assumption that black jurors as a group will be unable to consider impartially the State's case against a black defendant. 106 S.Ct. at 1718-1719.

The peremptory challenges complained of in this case were employed to remove persons for racially neutral reasons and reasons relating directly to the prosecutor's view concerning the outcome of the case.

Petitioner claims the prosecutor's in depth questioning about the death penalty, and his use of some of his peremptory challenges resulted in a jury deliberately tipped towards death in violation of Witherspoon. However, Witherspoon dealt with cause challenges, as opposed to peremptory challenges. In this case defense counsel also exercised peremptory challenges and questioned jurors as to the firmness of their convictions concerning the death penalty and exercised peremptory challenges to reject jurors strongly in favor of the death penalty. Questioning on an issue during voir dire need not stop once it has been established that a "for cause" challenge is not justified. As noted in Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) "lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where

provided by statute or rule..." Since the further questioning was appropriate to determine how to exercise peremptory challenges, under the logic of Rosales-Lopez, the further voir dire was appropriate.

Thus, questioning jurors further about their feelings concerning the death penalty after they have passed the Witherspoon test is not constitutionally suspect. The prosecutor had a right to use his peremptory challenges in this racially neutral fashion and had a right to ask enough questions to use the peremptories in an intelligent manner. There is no reason for this Court to issue its writ to review this issue.

III. THE ARGUMENT OF THE PROSECUTOR WAS NOT FUNDAMENTALLY UNFAIR.

As his next claim as to why this Court's writ should issue, Brown alleges that the prosecutor's argument was violative of Brown's constitutional rights when the prosecutor, anticipating defense counsel's argument that Christians ought not sentence a man to die, argued the Bible permitted the death penalty. Brown also complains of the prosecutor's quoting from the dictionary to define the words "heinous", "atrocious", and "cruel" and of the prosecutor's saying the people wanted the death penalty. However, when the entire unobjected to argument of the prosecutor is read, as opposed to excised bits, and when the argument is considered in light of the defense argument, the prosecutor's argument clearly does not warrant that this Court issue its writ. See State's Appendix, Brown v. North Carolina.

In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), this Court held that the standard for reviewing a prosecutor's argument is whether or not the argument was so fundamentally unfair as to deny the prisoner due process of law. In the context of the sentencing argument, it is improper for an argument to minimize the jury's sense of responsibility for determining the appropriateness of the death sentence. Caldwell v. Mississippi, 472 U.S. _____, 105 S.Ct. 2633 (1985).

Brown claims the prosecutor's argument that the Bible did not forbid the death penalty acted to minimize the jury's sense of responsibility and gave them an improper standard to follow. This argument is absurd.

The prosecutor carefully explained the North Carolina death penalty statute to the jury and emphasized that the death penalty is reserved for "that rare case, if you will, where that most severe penalty and sanction provided by the legislature should be applied." (S.A. 3). He explained the balancing tests, the ultimate responsibility of the jurors, and the specific questions to be answered by the jury. The portion of the argument that the Bible permitted the death penalty was preceeded by this comment from the prosecutor:

> It is a great responsibility that you have. It is my anticipation , I anticipate Mr. Griffin will talk with you about the Bible. He is entitled to do that. We have no quarrel with that, but I want to talk with you about it, because this is my last time to speak with you. (S.A. 18).

The argument concerning the Bible was ended with this statement:

> That is just after the Ten Commandments. That doesn't mean under our present law all persons convicted of murder in the first degree shall suffer death. That was the Lord speaking according to the Bible". (T p 1740).

If a defense argument asking for mercy on the basis of Christian or Judean philosophy is not an improper argument of Caldwell v. Mississippi, supra, a prosecution argument that the Bible does not forbid the death penalty is clearly not fundamentally unfair, especially where, as here, the prosecutor stressed the standards necessary under "man's law" to impose a death penalty. Indeed since, "It is entirely fitting for the moral, factual and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay v. Florida, 463 U.S. 939 (1983), it would seem that religious arguments are appropriate in the sentencing argument of both the State and the defense.

The prosecutor also argued the fact that "the people wanted

the death penalty." However, again since he emphasized the jury itself must make and be responsible for the sentencing decision, the argument did not diminish the jury's responsibility or otherwise render the sentencing procedure fundamentally unfair. Cf. Strickland v. Washington, supra; See also Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985).

Finally the defendant complains that the prosecutor read from the dictionary in describing the meaning of the words "heinous", "atrocious" and "cruel". Such an action is proper. Further, it was unobjected by the defense. Under such circumstances it if were error, it would have to be "plain error". United States v. Young, ___U.S.___, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

Considering the hideous mutilation and slaughter of the victims, there is no reasonable likelihood that the use of the dictionary to define heinous, atrocious or cruel resulted in the improper finding of the aggravating factor especially heinous, atrocious, or cruel, especially in view of the Court's care instructions on this aggravating factor.

In summation, the prosecutor's argument in no way rendered the sentencing hearing fundamentally unfair. There is no basis for this Court to issue its writ to review the argument of the State.

IV. PETITIONER'S RACIAL DISCRIMINATION CLAIM IS PROCEDURALLY BARRED BY BROWN'S FAILURE TO PRESENT EVIDENCE OR ARGUE THIS ISSUE IN STATE COURT.

Petitioner finally seeks certiorari on the issue of whether the death penalty in North Carolina is applied discriminatorily in that killers of white victims are allegedly more likely to receive the death penalty than killers of black victims. However, by failing to present evidence on this issue in State Court and failing to argue this issue, the petitioner is procedurally barred from receiving relief from this Court.

The Superior Court, as a matter of State law, found that

Brown had abandoned this allegation. The Supreme Court of North Carolina has denied certiorari on this issue. Thus, because of the abandonment of the issue, found as a matter of State law, precluded review of the issue substantively, it is clear that the trial court and Supreme Court of North Carolina decided this issue without ruling as a matter of Federal law on the allegation. Since the Court's ruling is based on a separate and adequate State ground, this Court is without jurisdiction to review this issue now. Caldwell v. Mississippi, supra; Herb v. Pitcairn, 324 U.S. 117 (1945). Since Brown, in effect, abandoned his Federal claim by failing to present evidence on this issue or argue its merits, he cannot now seek to use it as a basis for certiorari.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that David Junior Brown's petition for writ of certiorari should be denied.

Respectfully submitted, this 24 day of September, 1986.

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Joan H. Byers, Special Deputy Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of this RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of Record for petitioner David Brown, by depositing same in the United States Mail, first class postage prepaid, addressed as follows:

Bruce T. Cunningham, Jr.
235 East Pennsylvania Avenue
Post Office Box 540
Southern Pines, NC 28387

This the 21 day of September, 1986.

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APPENDIX A

Prosecutor's Sentencing Argument State v. David J. Brown
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North Carolina is one hundred years, therefore, it would be two hundred years. Human beings are imperfect, we can make mistakes. We are not perfect. There wasn't but one to my knowledge in the whole history of mankind. I would ask, isn't two hundred years enough punishment? I would beg, isn't two hundred years enough punishment?

Mr. Griffin will argue and discuss with you certain matters in the next few moments after Mr. Lowder comes up as prosecutor and makes some statements to you, which is his right and responsibility as prosecutor to do so.

We must all live with the decision that is made in this courtroom today as you sit in judgment of David Brown. We must live with that decision tonight, tomorrow, next week, next month, and for the rest of our lives. I beg you, is not two hundred years enough?

Thank you.

MR. LOWDER'S ARGUMENT TO THE JURY:

If it please the court, Mr. Gill, Mr. Van Camp, Mr. Griffin, and ladies and gentlemen of the jury, there is a song that I wish to refer to, and this is not a day for singing, but some words in this song that I wish to refer to at this time, and it goes something like, it starts out, "Give me men who are stouthearted men, who will fight for the rights they adore", and we have men and women on this jury, and this

is not a fight, but what we need and what we have, we trust, are stouthearted men and women from the body of Union County who are here to look after the rights of the individual, and the rights of all the people, the rights that you and all of us adore, and that is what this is about, this case, rights, the rights of the individual and they have been well protected and are being well protected by attorneys who know the rules, by the Judge who knows the law, and applies the law and sees to it that we don't go out of bounds, and that is the way it should be. We have a government of laws rather than of men. You learn that in your high school, a government of law rather than of men, bound by a law. That is what all of us are here for, to be bound within the rules, that is, to stay within the rules, to make sure that this defendant and all other defendants get the same treatment, fair treatment, justice, and justice and no more, if you will. So I trust as you sit there that you meant it when you said you really believe in capital punishment, and I suppose no one, even though they think they fully believe or as best they can that they believe in it, they can't really know until they are faced with that decision. You know, you look at the State seal there above the Judge, what is the motto, . I believe it is the motto. "Esse Quam Videri". I may be mispronouncing it, means to be rather than to seem. We trust that you do believe in capital punishment, not that you just seem to believe in it. And before this day is out,

I suggest to you that you will know and we will know just how much you believe in capital punishment in some cases. We say to you in all candor that under the evidence and the law in this case that any and all of you, as we trust all, believe in capital punishment, this is the case. This is that exceptional case, that rare case, if you will, where that most severe penalty and sanction provided by the Legislature should be applied. Now, that is not a bloodthirsty Solicitor talking, that is the law, that is the provisions in the law that the death penalty can be applied in this case, and you said that in that rare case, not in all first degree cases, but in that rare case, yes, you do believe in it.

Now, you owe me nothing. You have told me how you felt at the time, and I believe with candor, the truth, and this is not my case, this is not a difficult case as cases go for the prosecution. You say, how is that? Well, it is because of experience. This is our job. Now, we don't have cases like this, rarely do we have, but murder is not all that uncommon in the five counties that we serve. And so we do deal with terrible crimes. And this is, as I say, yes, it's hard work, but it's not all that difficult, it's not all that difficult after a time, I assure you, but for you it may be very difficult because you are inexperienced, most of you as jurors, and certainly you are inexperienced no doubt in this type of offense, the most serious of all, but I want you to recognize throughout,

as I hope that you have, that this is not my case, and what I personally think personally is not for you to consider, and that is true of of the lawyers. That's as it should be, folks, that is the rules applied by the court, and that is why you hear some objections, simply incidents of trial, and they are not to be considered by you. People, all of us, involved in this case, as I say, are required to go by the rules. Please understand all that we have done in that light.

You know, when we asked questions of you, many of you, I don't know how many, I can think of some, I know many, were born on a farm, that is, reared on a farm, and you know what hard work is. I suggest toyou that people that grow up on a farm like many of you that they learn some of the finest precepts that anyone can learn, something about hard work. It develops quality in the individual, excellent quality, yes, and firmness and resolve, and as a matter of fact out there in the open looking at the beauty of nature, dealing with the soil, sometimes from daylight to dark, as I imagine some of you older members of the jury who worked on the farm certainly know what I'm talking about, it does something to a man or woman just being that close to nature. And I suggest to you that people born and reared in that atmosphere are the salt of the earth, the best we have got, the best quality, and so we have an outstanding jury here and I don't say that to curry you favor, we have an excellent jury from Union County to hear the

case. When you were growing up, you learned many things and what you are today is primarily due to that invironment when you were small. We like to think we control our destiny, but when we look back, to be realistic, I suspect your mama and daddy controlled you right much, and that what you are is to a very large extent based on what they taught you and how they disciplined you, if they needed to, and so you aren't far from what you were when you were eight or ten years old, basic honesty, basic approach to living engandered and goes into the individual at a very early age, and you learned about your faith, your faith in God, the Christian religion which most of our law is based on, Christian faith, most all of the laws on the books are based on the Bible and that is the way we suggest it should be, that is the way it was with our forefather And some of you have the faith of your fathers' in you at this time and in your mothers and grandfathers and grandmothers and aunts and uncles,, no doubt, if you have them, and you have those precepts that you have had for many years about wh' you told us a little bit, that you don't know how that you came to believe in capital punishment, most of you, well, it's just, you know, I don't know when I discussed with my daddy, but it was just understood, understood as I came along, that we believed, that is, you know, in the family, I just came to believe it, I don't recall discussing it, maybe, but I know it is a part of me. And so we suggest to you that as you view

your role here today and this afternoon and make a decision in the case, that you will to a large extent fall back on your teachings, those recepts that you learned, that philosophy, and you will make a decision based on those precepts and early training.

In this case let's look at things as they were and it is very easy, it is very easy, particularly when we have gone through a long session of court, two weeks now, to sort of forget some of it, and you don't see the pictures here and the diagrams and all the exhibits. We could have them here right now. That is part of our evidence. That is part of the evidenc the Judge is going to tell you to consider, each and everything you have seen that the State introduced and has referred to to this point is for you to consider on this question here today, but I didn't have them brought here, I want to use words, talk about words. It's easy, it's easy to forget. You know, if we had---if you had before you, and I want you to think about this, we're entitled to have you think with us a little as we talk, please think with us. If we had here to show you a film, a moving picture of what happened in the apartment of Diane Chalflinch, illuminated on the screen and a good sound track with it, what would you see and hear? Could you take that I doubt it. I don't know that I would, if you'll pardon a personal reference, but I would suggest it would be impossible fo you all to sit there and watch each and every movement with

that apartment. Think about it. The magnitude and grossness of what occurred in that apartment. How did he get into the apartment? How did he do it? You don't know. Was she on the couch sleeping? Was she watching TV? Were they both in bed? Was one in bed, the other in the living room? Who got the knife first? We'll never know. Did one watch the other killed? Think about it. Think about the terror; think about the blood; think about the suffering; think about what, if any, yells, screams and terror. Did the little girl watch her mother slaughtered or did the woman, that is, Diane, watch her daughter slaughtered? We don't know. I'm using words. I want you to think with me this day about what happened in that apartment, and I want you to think about it when you go to your jury room about what happened in that apartment. Use your own imagination of how it might have been and was according to the physical evidence, hard evidence, including the palm pri think about the grossness. They talk about him being nice and kind and gentle. Sounds like a boy scout, if you'll pardon the reference. A scout is loyal, helpful, friendly, cheerful, obedient, brave clean. A man who brutally slaughtered these two, that defendant doesn't fit that pattern. He's a vicious killer and a menace to society.

In this case we have basically this. I know His Honor is listening. I'm going to try to abbreviate this as best I can. If I make an error, the Judge will certainly correct me.

You're going to have papers before you like this, and I'm not going over all of it. I will go over some of it. You've got various questions you're going to answer. To sum it up briefly, to start with you're going to consider all of the evidence. You're going to consider His Honor's charge on what aggravated circumstances you can and will consider, that is, whether they are present in the case. You are going to consider what, if any, mitigating circumstances appear in the case. Then you're going to answer questions whether or not the aggravated circumstances outweigh the mitigating circumstances, and if you find that they do not, you will enter a decision of life imprisonment. If you find aggravated circumstances outwei the mitigating circumstances, you may consider whether they merit his being sentenced to death. That is basically the way it is. And the Judge will tell you that even if you find that the aggravated circumstances outweigh the mitigating circumstances and justify, that is, permit you to enter a verdict that will mean the death penalty, you may still in your unbridled discretion return to this courtroom with life imprisonm in each case, the only place I know of in the law where the jury is free just to do what it pleases, in spite of what you find. That is the law. I don't quarrel with the law.

You know, since certain references were made to the law some years ago, let me say this to you. When some of our forefathers were here a hundred and a hundred and twenty-five

years ago, we probably had around thirty, thirty-five crimes that called for the death penalty. That's some of what your forefathers knew about it. You don't know about it maybe. About 1850 probably had about thirty or thirty-five crimes that called for the death penalty, and gradually, as some people say, and with which you may agree, we got more civilized, more and more civilized, folks. Only a few years ago we had four felonie capital felonies. Today there is one, just one, first degree murder. But we got more civilized, whether you agree with it or not, that is the way the laws were changed. We go by the law. I believe in going by the law. I might not agree with some of the law, but I go by it. We're bound to.

One, murder one, it is called by some people, so we have become in the minds of some people far more civil in our one human's, you know, humanity, more civil, I don't know. There are changes. When you were young growing up on the farm, or wherever you grew up, did you lock your doors? Do you lock your doors now at night? Has there been any change? What has made the change, if there has been one? You don't live in darkness, you live in the light. You read the newspapers, you hear the news, you watch the television, you know what's happeni in this land. It's time for people to stand up and be counted, folks. Stouthearted men and women. Stand up and be counted.

I want to talk now about two aggrated circumstances that we say definitely are present in this case and overpower

completely any mitigating circumstance that you may find in the case. Now, you will find when Mr. Griffin talks with you, if he refers to them, and he may, Mr. Van Camp talked with you about some of them, you will find that there are more enumerated questions, that is, more questions about mitigating circumstance than there are aggravated circumstances. The Legislature has not said that if you find two or three or more, for that matter, mitigating circumstances, that if there are more mitigating circumstances than there are aggravated circumstances, that you will find life imprisonment. It is not a question of number. It is not a question of how many might be present. It is a question of what each of these things mean to you. It is a question of weight, like a scale. If the aggravated circumstances, even if it be one, we contend it's at least two, you will hear about two in this case, that is, the question about two of them, if they carry so much weight, either one or both of them, on one side of the scale, and these others over here are small indeed and very light, if you find one or two present that outweigh all these others, that means you can answe this question, do the aggravated circumstances outweigh the mitigating circumstances, it is not a question of number, it is a question of weight; and what bears the weight in this case? The atrocious, cruel, vicious killing of these two victims, that where the weight in this case is. What are you going to remembe about this case ten years from now if you're fortunate to live

that long, as we hope you will. What will you remember? Will you remember that he was gentle and kind and looked after young'uns wherever they were, and that's not a light comment. Does that really stack up against the brutal killings of Diane and Christie Chalflinch? Not at all. Almost insignificant the way he has treated some children in his life. The fact that he's been kind to his mother, does that add up to anything compared with the brutal slayings of these two persons? Not at all. But they under our law, and again it is the law, they are permitted to bring out any good thing, any good deed this defendant has done in his life from the time he was born until the present. The law allows all of it to come in, anything they can come forth with about his life. And there's one provision in here that says will even if they haven't told you about it, even if they don't even comment about it, one of the provisions of the law is that if you in your own minds have seen something in this case that you find to be a mitigating circumstance, even though nobody has mentioned it to you, including all of the brainpower of three attorneys, even if they haven't even thought about it, you can still find it. Think about that. Think of the length to which the law goes to protect the individual. That's the law.

I don't want to wear you out, but let me say this to you. The first question you're going to be asked about is, "Was this murder especially heinous, atrocious or cruel?" Now,

I would doubt, I suggest that you rarely use the word heinous or atrocious. Do you know its meaning? I don't know whether you do not not, but I want to read from Webster's unabridged dictionary what it means so you will have full knowledge of what it means, and it reads as follows: "Odious, hateful, atrocious, odious, abominable, contempt, scorn, flagrant," these are synonyms here, "atrocious, infamous, nefarious, wicked. A crime is heinous which is so wicked as to arouse the strongest hatred and revulsion. An offense is fragrant which is glaringly bad or openly evil. A crime is atrocious which is extremely or shockingly wrong, bad, evil, cruel, etc." Everyone of those words fit, folks, fit this man and the way he committed the two crimes. Now, let's go to the next one. Atrocious. These are the words the Legislature used, so I must refer to them and I am entitled to read the book, Webster's. "Atrocious", which comes from the Latin, which is spelled "a-t-r-o-x." It says, "fierce, cruel, extremely brutal or cruel, outrageously wicked, evil, very bad, in bad taste, abominable," the third definition, "very grievous, violent." All the words fit, don't they? Next, cruel. Comes from the French, one is spelled the same way in French, Latin is crudelis, c-r-u-d-e-l-i-s, means raw, unfeeling, disposed to inflict pain and suffering, willing or pleased to torment; vex, or afflict; without pity, compassion, or kindness, fierce; savage; hardhearted. Is there a word that I have mentioned from

Webster's that you would not apply to the acts of the defendant
Not a one. Those are not my words. Those are the definitions
of the crime that words, we say, that are in this case, and
you're going to be allowed to find that in question #1, that's
an aggravated circumstance. Everyone of the words in Webster's
apply. Next question, "Was this murder part of a course of
conduct in which the defendant engaged and did that course of
conduct include the commission by the defendant of other crimes
of violence against another person?" Well, you know that to
be the case. We got more than one crime. Two. Let me read
that to you again. "Was this murder part of a course of conduct
in which the defendant engaged and did that course of conduct
include the commission by the defendant of other crimes of
violence against another person?" The answer to that is obvious
yes. When he entered the apartment and started killing one of
them, it involved the other and he killed the other. Again we
don't know which he killed first. In other words we would
suggest this to you, in other words you can take these crimes
in combination one with the other in determining whether or not
that is an aggravated circumstance. To put it a little differ-
ly and more explicitly, you can put all the stab wounds togethe
all of them, mix them up, and consider whether all of them
added together in effect amount to an aggravated circumstance.
Now, those are the two aggravated circumstances in this case,
and they outweigh everything else in the case, folks. That is

our contention. They can talk about him being kind and nice
and being gentle, treating a woman like a lady, working nice
around people, never in any trouble around fellow employees,
playing music down in Southern Pines, working hard, if he did,
and I assume he did, but when you put it all in the scales,
you're going to find, we suggest, that what I have just talked
about the way and manner and brutality with which these offenses
were committed, outweigh everything else in the case without
any question. Isn't that what you're going to remember about
this case, what happened in that apartment? That's basically
what you will remember. All they have said about him, pale
into insignificance when you think about that. You've got
240 reasons to think about, when you go back and think about
the death penalty. Rights. We talk about rights, and I'm going
to quit here in just a minute. Got a couple things in the
Bible I want to read you before I quit. Rights. Our forefather
at least some of our forefathers, put it in the Preamble to
the Constitution, I believe, that every person in this great
land of ours is entitled to life, liberty and the pursuit of
happiness. They say the price for liberty is eternal vigilance.
For the protection of life, it is necessary that you come here
as a juror and sit as you sit today, because only you, the jurors
can enforce the laws which we are dealing with. You call it
a prison, it is not really a prison. It is something you ought
to be glad that you have a right to do, to come here and sit

in a case like this. It is a tough enough case, to be sure, but with this evidence it ought not to be that hard. I didn't say it was easy, but it ought not to be overly hard when you know what is at stake.

Let's talk about rights. We have talked about the rights of this defendant, and you will hear from Mr. Griffin a great deal about that, he's going to say, don't kill him, please, I beg of you, don't kill him. That's what he's going to say, and he's going on to shed a tear perhaps, if he wants to, and if that's the way he feels at the moment, I do not fuss about that. That's his role to fill. Why shed a tear this day for this defendant? And in that regard, there was something I read to you a little bit ago about lack of compassion What did he spare these two women that he killed? Did he spare them anything? Absolutely not. Nothing. Have you heard any of his witnesses tell about any remorse that he has? Any regret You have had a chance to look at him in the courtroom. You may take into account his appearance and demeanor in the court room. You have looked at him, no doubt. Do you know of anythin in this case that indicates that he really has any pangs of conscience? Do you? Think about that when you go back in the courtroom--excuse me, in the jury room. Oh, yes, you have some feelings for his mother. And I want to speak about that. You told me this wouldn't make any difference. Anyone who sat here and knows her feelings certainly has compassion for her. Even a hardhearted prosecutor can have such feelings if he's

hardhearted, not overly so, I hope, but I can tell you this, it's got nothing to do with this case. He has no regret. I don't understand him and you don't understand him. Nobody can fathom the thoughts that go through this man's mind. I say to you not a psychiatrist can do it. Have you ever heard of such a terrible killing of a woman and her child? Never, I suggest since you have been living have you heard of this bad a case, certainly no worse. And if this case doesn't call for the death penalty, I would ask you could you possibly sit down and put down on a piece of paper what you think the case should be that you'd apply the death penalty that you say you believe in? Before you came here if you tried to sit down with a pen and paper and write out the kind of case that you thought the death penalty ought to be applied and put into force, I don't believe you could have written one much better th this. Could you? You would have to be an excellent author and writer and have a more vivid imagination than I would expect you to have. The rights, the rights of Diane and Christina Chalflinch of life, of liberty and the pursuit of happiness. Some of you have lived most of your life. Lots of us have as far as the good years. Some of you have quite a few years on you, and some of you as you live those years you have been many places and done many things and you have seen children at play, at tourist spots, and their mothers and fathers perhaps at a playground enjoying the company of one another, breathing

free air, fresh air, and enjoying the beauties of nature, the flowers, the beautiful skies. What happened to Diane and Christina's right to those things? There sits the man that did away with them. No more air to breathe, no more sights to see, no more sights to see.

In World War I there was a young French poet who was in battle, and he wrote a poem a few days before he died in battle. He was considered a very gifted young man, and he wrote "In Flanders Field", not altogether appropriate, but it has some words in it which I want you to remember, and if I can remember it, it goes something like this. "In Flanders Field the poppies blow between the crosses,row on row, that mark our places; and in the sky the larks, still bravely singing fly scarce heard amid the guns below. We are the Dead. Short days ago we lived, felt dawn, saw sunset glow, loved and were loved, and now we lie in Flanders fields."

A short time ago Diane and Christina Chalflinch lived. They saw the sunrise, the sunset, and they loved and were loved by those about them, and they are gone at the hands of this killer.

It is a great responsibility that you have. It is my anticipation, I anticipate Mr. Griffin will talk with you about the Bible. He is entitled to do that. We have no quarrel with that, but I want to talk with you about it, because this is my last time to speak with you. He may refer to one or more

of the Ten Commandments, which we have here in the old Bible about 1847, this Bible, and I turn to a place of Exodus in which a place where the Lord spoke through Moses and gave us the Ten Commandments. It is in Chapter 20 of Exodus, and I'll just read that particular one. "Thou shalt not kill". That has been translated in more recent Bibles, "Thou shalt not murder." That is the law that applied to him on and before he killed these two victims. Thou shalt not kill. He violated the Commandments of God.

Now, Mr. Griffin will tell you that this is set out in the old Mosaic Law which called for an eye for an eye and a tooth for a tooth, but if he says ignoresome portions of this, surely he wouldn't suggest you ignore the Commandments of God, the Ten Commandments, but in another section in Chapter 21 of Exodus the Lord still speaking, says this. "He that smite a man, so that he die, shall be surely put to death." And 14, that is, verse 14, Chapter 21, says this. "But if a man come presumpuously upon his neighbour, to slay him with guile; thou shalt take him from mine altar, that he may die." That is just after the Ten Commandments. That doesn't mean under our present law that all persons convicted of murder in the first degree shall suffer death. That was the Lord speaking according to the Bible.

Folks, this is a day that calls for the best in you; calls for as firm a position as you have ever been called upon

to take, but it is a day necessary in the lives of people in this country if others like Diane and Christina Chalflinch are to be safe. They had a right to be safe in their apartment, to close the door, locked or unlocked. We don't know which it was. And to go to bed, lie down on the couch, go to sleep, if they did, and be secure in their home. They say a person's home is his or her castle, from which you don't have to retreat in the law. In other words, that is the safest place you can be, at home, and if that is not safe, what do you have? You don't have anything. You don't have anything. Yes, as Mr. Van Camp says, it's not a matter of being bloodthirsty, yes, we want the death penalty, it is provided for in the book. It should be applied in this case, we say. Nothing less. Justice, but justice, and no more. We are entitled to justice, our side, the State, the people. You know in our day people wonder what happens up at that courthouse. What do they do up there? You would know whether they are critical or not. Have you been critical? Don't answer. What are they doing up there? Why doesn't somebody do something about it? You ever heard that? You have heard it, but you know it is not the District Attorney and the officers, nor the Judge, that enforce these laws. Ultimately it is you. So you share that responsibility with all these people at the courthouse now.

You know, we ask you to do this in closing. The lives of Diane and Christina Chalflinch are gone, but let them not

have died in vain. Let a message go out from the Union County Courthouse on this the 20th day of December, 1980 to this defendant and all who would act likewise, let it ring loud and clear that people, if you decide you're going to slay people any person who wants to slay people in their own home, unprotected women and children, that we're going to deal with you as the law permits. Let that message go out, folks. Only you can do it. The officers can't do it. I can't do it. We have no quarrel with the system, but you, you can do it, and it should be done, and it should be done without undue trouble. Take your time, deliberate, think about it. I want you to think when you weigh and consider all of it, put it in the scale and weigh it, and we say you cannot in all good conscience come to another conclusion if you believe in the death penalty, and you said you did. We don't want life imprisonment. We want the death penalty, folks, and I'm speaking for the people, not for Carroll Lowder. The people. You know what the people think. Some of you weren't here when this jury was selected the first day. What percentage of the people that you heard talk about it up here believe in capital punishment? 90 percent. What do the people want, folks, when you have this evidence and this law? You want your lives to be secure. You want your children and grandchildren to be safe in their home. And if they are going to be safe in their homes, somebody must act. This is the case to act on, folks, not for Carroll Lowder, no,

but for all people. This man, such a depraved, a wicked mind, you certainly can't tell it by looking at him, but that's what is in his mind, nobody will ever figure it out. How do you deal with such a foe? How do you deal with such a foe within society? It's for you to say.

Sometime from now you will think back on what you did, and I say you can think back with resolution and knowing that you did what was right in returning the death penalty, if you believe in the death penalty, we say that that's what you will do.

I thank all of you for your time and attention to us, all of us, my assistants, Mr. Church and Mrs. Shelton, these officers that work long and hard, I thank you for all of them, but it is your system, it is your community, and even though these crimes happened in another county about seventy-five or eighty miles away, people down there are entitled to the same protection as you are and I know you will feel that way, and without more, without saying anymore, folks, on this 20th day of December send out that message, we resolve knowing that you did right, and as you deliberate on this again, when you come to weigh these things that you are going to hear about, think of where the weight is, what really counts in this case, and you know it was atrocious, cruel and vicious manner, 250 plus wounds about the bodies in their own apartment. I ask you as seriously and sincerely as I can to return in each case with

a verdict of capital punishment.

I thank you for your time and attention.

COURT: Members of the jury, you have been sitting there about an hour. You want to take a recess now? All right, take a ten minutes recess, whatever time is necessary. Be back in ten minutes.

NOTE: Recess over. All parties in the courtroom. JURY RETURNED.

MR. JAMES E. GRIFFIN'S ARGUMENT TO THE JURY:

Your Honor, Mr. Gill, Mr. Lowder, Mr. Church, Mrs. Shelton, ladies and gentlemen of the jury, I wish that I thought I could get up here and give to you a well reasoned speech. I wish that I could get up here and give you a speech without emotion. I can't. As Mr. Lowder told you, I may shed a tear. I don't doubt that. I am an emotional man. I live somewhat by my emotions. I am not shedding a tear for David Brown. I don't want you to think that I am. I am shedding a tear, if I do, for everything that has happened, for Diane Chalfinch, for her daughter, for her mother, for her father, for everything that has happened.

I want to clear the record of one thing, though. Mr. Lowder says take this man's life for Diane Chalfinch and her daughter. There is nothing we can do for Diane and her daughter regardless of what we do. They have gone home to their final

OPINION

SUPREME COURT OF THE UNITED STATES

DAVID J. BROWN v. NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 86–5234. Decided November 3, 1986

The petition for a writ of certiorari is denied.

JUSTICE O'CONNOR, concurring.

I write briefly in support of the Court's denial of the petition for certiorari in this case, and to respond to JUSTICE BRENNAN's suggestion that the limits on the prosecutor's right to peremptorily challenge jurors found in *Batson* v. *Kentucky*, 476 U. S. —— (1986), apply outside the context of racial discrimination forbidden by the Equal Protection Clause. *Batson* does not touch, indeed, it clearly reaffirms, *id.*, at ——, the ordinary rule that a prosecutor may exercise his peremptory strikes for any reason at all. *Batson*, in my view, depends upon this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter. It is central to *Batson* that a "person's race simply 'is unrelated to his fitness as a juror.'" *Id.*, at —— (citation omitted).

There is no basis for declaring that a juror's attitudes towards the death penalty are similarly irrelevant to the outcome of a capital sentencing proceeding. Indeed, *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), upon which JUSTICE BRENNAN's dissent so heavily relies, itself recognizes the relevance of this attitudinal factor. Categorical exclusion of jurors with moral qualms over capital punishment is forbidden precisely because such a practice would produce "a jury uncommonly willing to condemn a man to die." *Id.*, at 521.

Moreover, JUSTICE BRENNAN's dissent ignores a fundamental distinction between peremptory challenges of jurors

and challenges for cause. Challenges for cause permit the categorical and unlimited exclusion of jurors exhibiting an inability to serve fairly and impartially in the case to be tried, as noted in *Wainwright* v. *Witt*, 469 U. S. 412 (1985). In *Witherspoon*, the Court held that the Constitution does not tolerate such a categorical exclusion of jurors who merely express moral scruples about or general objections to capital punishment unless it would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright* v. *Witt*, *supra*, at 424. (citation omitted).

Peremptory challenges are limited in number. Each party, the prosecutor, and the defense counsel, must balance a host of considerations in deciding which jurors should be peremptorily excused. Permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors, or any other factor, in exercising peremptory challenges simply does not implicate the concerns expressed in *Witherspoon*.

We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be. That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact. In my view, that special rule is a product of the unique history of racial discrimination in this country; it should not be divorced from that context. Outside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike a juror without giving any reason applies. Because a juror's attitudes towards the death penalty may be relevant to how the juror judges, while, as a matter of law, his race is not, this case is not like *Batson*.

OPINION

SUPREME COURT OF THE UNITED STATES

DAVID J. BROWN *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 86–5234. Decided November 3, 1986

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would grant certiorari because the petitioner presents strong evidence that the state used its peremptory challenges in this case to exclude jurors that it was forbidden to excuse for cause under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

In *Witherspoon*, this Court held that, in a capital case, the prosecution may not exclude for cause those jurors who indicate that they have scruples about the death penalty, but who nonetheless state that such beliefs would not prevent them from performing their duties as jurors according to law. Exclusion of such jurors, we said, denies a capital defendant the right to sentencing by an impartial jury that is representative of the community, for it "produce[s] a jury uncommonly willing to condemn a man to die." 391 U. S., at 521. We underscored the importance of this right in *Adams* v. *Texas*, 448 U. S. 38 (1980), which held unconstitutional the exclusion of jurors who acknowledged that their concerns about capital punishment might affect their ability to find facts that would lead to its automatic imposition. Texas could not, we said, bar jurors who stated that they would honestly find the rele-

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vant facts if convinced of their existence beyond a reasonable doubt,

> "yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." *Id.*, at 50.

The petitioner in the case before us, David J. Brown, was convicted of the first-degree murder of two women and given two death sentences. At voir dire, the prosecutor had sought to determine not merely if prospective jurors had any scruples about the death penalty that might impair their performance, but if they had any scruples about it at all. The prosecutor was remarkably candid about this objective in addressing the venire at the start of voir dire:

> "We want to know if you do in fact believe in capital punishment, not wavering. We want to know at the outset, that is when we approve you as a juror, if we do, that you surely do believe in capital punishment in some cases, and that you can, if necessary, make a decision that would involve capital punishment." Pet. at 10.

As the voir dire reveals, the prosecutor diligently pursued his goal of seating only those jurors rigidly committed to the death penalty:

> "Q.: Mr. Caldwell, how do you feel about capital punishment? Are you for it or against it?
> A.: I am for it.
> Q.: I didn't understand you.
> A.: I said I'm for it.

> Q: How long have you been in favor of capital punishment in some cases, Mr. Caldwell?
> A.: All my life, every time I hear tale of something like that, about all my life, I guess.
> Q.: That's what I wanted to hear, Mr. Caldwell.
>
> . . . . .
>
> Q.: Mrs. Pope, do you know your mind to the extent of saying whether or not you believe in capital punishment?
> A.: I do.
> Q.: Have all of your adult life?
> A.: Yes, sir.
> Q.: And if ultimately you are called upon after a proper instruction by the Judge to carefully consider what should happen to, to determine life or death, that wouldn't bother you unduly, will it?
> A.: No, sir." Pet. at 7, 9–10.

In another exchange, after juror Williams stated that he believed in capital punishment, the prosecutor continued to question him to establish that he had the "strength and fortitude" to render a death verdict "without any doubt." Pet. at 10.

Those jurors who indicated the slightest uncertainty about the death penalty were excused by peremptory challenge, without inquiry into whether their convictions would render them incapable of performing their duties as jurors:

> Q.: Mrs. Beaver, having sat here for some several minutes in this courtroom today, you know what we are here for?
> A.: Yes.
> Q.: Having thoughts about capital punishment, at least I would assume here today, and no doubt having thought about it in the past, do you know your mind about that question?
> A.: I'm afraid I don't.
> Q.: Afraid you don't?
> A.: No.

> Prosecutor: The State will excuse Mrs. Beaver with our thanks. Pet. at 9.

The State concedes that it could not have excused for cause those jurors failing the prosecutor's litmus test. It maintains, however, that since it used peremptory challenges to accomplish this end, its conduct is immune from scrutiny. The State reads our recent decision in *Batson* v. *Kentucky*, —— U. S. —— (1986), as significant only in that it proscribes racially discriminatory peremptory challenges. It insists that, since the challenges were exercised in this case in a racially neutral manner, they are free from constitutional infirmity.

The implication of the State's position is that it is free to use its peremptory challenges to violate any constitutional command other than the Equal Protection Clause. The state, however, misses the wider significance of *Batson*: that the broad discretion afforded prosecutors in the exercise of peremptory challenges may not be abused to accomplish *any* unconstitutional end. In *Batson*, we said that "counsel's effort to obtain *possibly relevant* information about prospective jurors is to be distinguished from the practice at issue here." —— U. S. ——, at ——, n. 12 (emphasis added).

JUSTICE O'CONNOR's concurrence observes that, as an unfortunate matter of *fact*, race may be relevant in that it may actually influence a juror's decision. The concurrence correctly notes that such factual relevance is insufficient to justify the exercise of a peremptory challenge on the basis of a juror's race, because race has been deemed irrelevant as a matter of *law*. The concurrence, however, fails to recognize that precisely the same situation obtains with respect to scruples about the death penalty. Such scruples may be relevant as a matter of *fact*. Nonetheless, that is insufficient to justify the use of peremptory challenges to exclude jurors with such scruples, for *Witherspoon* and *Adams* make clear that this characteristic is irrelevant as a matter of *law*. It does not the minimize the tragic history of race discrimination in this country to insist that we enforce the *Witherspoon* proscription just as faithfully as that forbidding reliance on race, for we may not pick and choose which constitutional rights we will and will not vindicate in monitoring the jury selection process.

Peremptory challenges may be used for reasons that may not comport completely with rational analysis, or that may resist coherent articulation. Such latitude has for practical reasons required a presumption that these challenges are exercised in a constitutionally responsible fashion. As *Batson* makes clear, however, that presumption is rebuttable. In this case, the Court is presented with evidence from the voir dire that plainly indicates that the prosecutor used its peremptory challenges to obtain the "hanging jury," *Witherspoon*, 391 U. S. at 523, that he could not obtain through challenges for cause. We therefore cannot maintain the usual presumption that these challenges were properly used.

Agents of the State enjoy considerable discretion in performing certain functions within the criminal justice system. With great discretion, however, comes great responsibility. When a court has evidence that the state has not lived up to that responsibility, its refusal to intervene converts discretion into a license for constitutional violation. For this reason, I would grant the petition for certiorari in this case.